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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,
Petitioners,

v.

DOUGLAS WILLIAMS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **WHETHER THE NEW RULE OF *MILLS V. MARYLAND*, 486 U.S. 367 (1988) AND *MCKOY V. NORTH CAROLINA*, 494 U.S. 433 (1990) APPLIES RETROACTIVELY TO ALREADY FINAL CONVICTIONS AND DEATH SENTENCES UNDER THE SECOND EXCEPTION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989) FOR "BEDROCK PROCEDURAL ELEMENTS" WHICH ARE "IMPLICIT IN ORDERED LIBERTY?"**

II. **WHETHER *TEAGUE* IS AN AFFIRMATIVE DEFENSE WHICH MUST BE RAISED BY THE STATE IN THE DISTRICT COURT OR ELSE IS WAIVED?**

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NO. _____

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GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

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DOUGLAS WILLIAMS, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Gary T. Dixon, Warden of Central Prison, Raleigh, North Carolina, and Lacy H. Thornburg, Attorney General of the State of North Carolina (hereinafter "State"), request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in ***Williams v. Dixon***, ___ F.2d ___, No. 89-4001 (4th Cir., Mar. 13, 1992), ***reh'g denied***, ___ F.2d ___, No. 89-4001 (4th Cir., Apr. 17, 1992), which vacated Respondent Douglas Williams, Jr.'s death sentence.

OPINION BELOW

This petition seeks review of the published decision by the United States Court of Appeals for the Fourth Circuit, which is reproduced in the Appendix (App.) at A1-A24. The order of

the Fourth Circuit denying the State's petition for rehearing and suggestion for rehearing in banc is found in the Appendix at A25.

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of March 13, 1992 (rehearing denied April 17, 1992) is invoked pursuant to 28 U.S.C. §1254(1) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

U.S. Const. Amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

U.S. Const. Amend. XIV, §1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

N.C.Gen.Stat. §15A-2000(b) (Cum. Supp. 1981):

> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
>
> (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors.

STATEMENT OF THE CASE

On the night or early morning hours of August 1-2, 1981, the Respondent, Douglas Williams, Jr. (hereinafter referred to as "Williams"), tortured and battered a 100-year-old female victim (Adah Herndon Dawson) with two metal cuckoo clock weights, ransacked her home, rammed a mop handle into her vagina with such force as to cause multiple fractures of her sacrum and pubic bones, and left her to die in a pool of her own blood. ***State v. Williams***, 308 N.C. 47, 50-56, 301 S.E.2d 335, 339-42, ***cert. denied***, 464 U.S. 865, ***reh'g denied***, 464 U.S. 1004 (1983). On August 2, 1981, after initially denying any involvement, Williams admitted committing the crime and was arrested. Williams' bloody footprints also were found at the scene, his fingerprints were identified on various objects in the Dawson home, and he had forged the signature on a check from Mrs. Dawson's checkbook.

On August 17, 1981, Williams was indicted for the first-degree murder of Mrs. Dawson. He pleaded not guilty and was tried at the November 16, 1981 Criminal Session of the Superior Court of Edgecombe County. The jury found Williams guilty of first-degree murder under the felony murder rule for having murdered Mrs. Dawson during the perpetration of a first-degree burglary, as well as during the perpetration of a sex offense, and also on the theory that the murder was committed with premeditation and deliberation.

At the sentencing hearing convened pursuant to N.C.Gen.Stat. §15A-2000 (Cum. Supp. 1981), the trial court submitted four possible aggravating circumstances, which the jury found from the evidence and beyond a reasonable doubt: (1) that the murder was committed while Williams was engaged in the commission of first-degree burglary [N.C.Gen.Stat. §15A-

2000(e)(5)]; (2) that the murder was committed while Williams was engaged in a sexual act [N.C.Gen.Stat. §15A-2000(e)(5)]; (3) that the murder was committed for pecuniary gain [N.C.Gen.Stat. §15A-2000(e)(6)]; and (4) that the murder was especially heinous, atrocious or cruel [N.C.Gen.Stat. §15A-2000(e)(9)]. (App. A45-A46) The trial court submitted five possible mitigating circumstances, which the jury answered as follows:

(1) Does the defendant have a significant history of prior criminal activity?

Answer: Yes. [N.C.Gen.Stat. §15A-2000(f)(1)];

(2) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(2)];

(3) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(6)];

(4) The age of the defendant at the time of the murder?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(7)]; and

(5) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(9)].

(App. A46-A47)

The jury then determined from the evidence and beyond a reasonable doubt that the aggravating circumstances found to exist were sufficient to outweigh the mitigating circumstances, and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. (App. A47) Based on its answers, the jury recommended a sentence of death, and on November 20, 1981 the state court judge imposed a death sentence. (App. A55-A57)

Williams appealed, and on April 5, 1983 the North Carolina Supreme Court found no error in either the guilt or sentencing phases of Williams' trial. ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335 (1983). Thereafter, Williams filed a Petition for Writ of Certiorari in this Court, which was denied on October 3, 1983. ***Williams v. North Carolina***, 464 U.S. 865, ***reh'g denied***, 464 U.S. 1004 (1983).

On May 7, 1984, Williams filed a Motion for Appropriate Relief in state court pursuant to N.C.Gen.Stat. §15A-1415 (Cum. Supp. 1981), in which he claimed, ***inter alia***, that the sentencing instructions violated ***Lockett v. Ohio***, 438 U.S. 586 (1978) by requiring unanimous agreement of the jurors in order to find a mitigating circumstance. On June 17, 1985, the state court denied post-conviction relief, specifically holding that the unanimity requirement for finding mitigating circumstances was proper under ***State v. Kirkley***, 308 N.C. 196, 217-18, 302 S.E.2d 144, 156 (1983). Williams subsequently filed a Petition for Writ of Certiorari in the North Carolina Supreme Court pursuant to N.C.Gen.Stat. §7A-32(b) (1981), §15A-1422(c)(3) (1978), and N.C.R.App.P. 21, seeking review of the post-conviction Order, but the North Carolina Supreme Court denied certiorari on July 7, 1987. ***State v. Williams***, ___ N.C. ___, 358 S.E.2d 68 (1987).

On October 13, 1987, Williams filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the federal District Court below, again claiming, ***inter alia***, that the unanimity re-

quirement for mitigating circumstances violated ***Lockett***. On September 13, 1988, United States District Judge Terrence W. Boyle entered a Judgment and 53-page unpublished Order denying Williams' habeas petition, specifically holding that the instructions in Williams' case were distinguishable from the intervening decision in ***Mills v. Maryland***, 486 U.S. 367 (1988) because here the jury was allowed to reconsider mitigating evidence in determining whether the aggravating circumstances outweighed the mitigating circumstances by proof beyond a reasonable doubt. Williams subsequently filed in the District Court a "Motion for Relief from Judgment and/or Alter or Amend the Judgment Pursuant to Fed.R.Civ.P. 52(b), 59(a)(2), and 60(b)(6)." Judge Boyle denied the motions on December 6, 1988.

Williams gave notice of appeal, and on January 24, 1989 Judge Boyle granted probable cause to appeal. Following briefing, Williams' appeal was argued before a panel of the Fourth Circuit on November 2, 1989. One of the contentions briefed and argued by Williams on appeal was that the trial court's sentencing instructions required unanimous agreement by the jurors as to the existence of mitigating circumstances in violation of ***Mills***.

On March 5, 1990, this Court decided ***McKoy v. North Carolina***, 494 U.S. 433 (1990), which held that North Carolina's unanimity requirement for mitigating circumstances, previously approved in ***State v. Kirkley***, 308 N.C. at 217-18, 302 S.E.2d at 156, violated ***Mills***. By letter of supplemental authorities to the Fourth Circuit dated March 12, 1990, the State pleaded that the relief sought by Williams based upon ***McKoy*** would create a new rule under ***Teague v. Lane***, 489 U.S. 288 (1989), which could not be applied retroactively to Williams' already final conviction and death sentence.

On March 16, 1990, Williams petitioned the North Carolina Supreme Court to exercise its supervisory jurisdiction under N.C.R.App.P. 2 and 21(a)(1), as well as Article IV, §12 of

the North Carolina Constitution, to review his death sentence in light of ***McKoy***. Contemporaneously, Williams filed in the Fourth Circuit a motion to defer further proceedings on his appeal pending re-exhaustion of his claim that North Carolina's procedure under which he was sentenced to death unconstitutionally precluded the jury from giving effect to proffered mitigating evidence because of the unanimity requirement. On April 24, 1990, the Fourth Circuit granted Williams' motion to hold its decision on appeal in abeyance "pending disposition by the Supreme Court of North Carolina in ***McKoy v. North Carolina*** and related cases and the petitioner's motion to remand."

On October 3, 1990, following its decisions in ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990) and ***State v. McNeil***, 327 N.C. 388, 395 S.E.2d 106 (1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 1403 (1991), the North Carolina Supreme Court entered an order dismissing Williams' petition. ***State v. Williams***, ___ N.C. ___, 397 S.E.2d 237 (1990).

On November 6, 1990, the Fourth Circuit ordered the case "returned to the active calendar for oral argument" and granted the parties' request for supplemental briefing "on all issues previously litigated." Following supplemental briefing by the parties, in which the State argued that Williams' ***Mills/McKoy*** claim was barred by the non-retroactivity principles of ***Teague***, the Fourth Circuit panel heard reargument of the appeal on April 8, 1991. On March 13, 1992, the Fourth Circuit panel issued its opinion vacating Williams' death sentence and remanding for resentencing because the sentencing instructions violated ***Mills*** and ***McKoy***. (App. A7-A17) On March 25, 1992, the State sought rehearing ***en banc***, but the Fourth Circuit denied the petition on April 17, 1992. (App. A25) On April 21, 1992, the State filed a motion seeking to stay the mandate pending its petition for writ certiorari to this Court, which the Fourth Circuit granted on April 23, 1992. (App. A26)

REASONS WHY THE WRIT SHOULD ISSUE

Over ten years after his conviction, the Fourth Circuit panel vacated Williams' death sentence for the first-degree murder of Mrs. Dawson due to sentencing instructions deemed to be unconstitutional under this Court's intervening 1990 decision in ***McKoy v. North Carolina***, even though North Carolina law in effect at the time Williams' death sentence became final approved the unanimity requirement for finding mitigating as well as aggravating circumstances. ***State v. Kirkley***, 308 N.C. at 217-18, 302 S.E.2d at 156, ***overruled in part in, McKoy v. North Carolina***, 494 U.S. 433 (1990).[1]

The panel's decision held that the instructions given at Williams' sentencing proceeding in November of 1981 were "identical" to the sentencing instructions in ***McKoy***,[2] and that Williams is entitled to the benefit of the ruling in ***McKoy*** notwithstanding the newly-announced principles of non-retroac-

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1 The panel's decision mistakenly asserts that "[a]t the time of Williams' ***trial***, a North Carolina capital sentencing jury was required to 'unanimously find that a mitigating circumstance exist[ed] before it [could] be considered for the purpose of sentencing.'" (App. A8, ***citing***, ***State v. Kirkley***, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983)) However, in November of 1981, North Carolina law had not addressed and did not impose a unanimity requirement for the finding of mitigating circumstances. ***Kirkley*** was not decided until May 3, 1983, almost one month ***after*** the North Carolina Supreme Court upheld Williams' death sentence on direct appeal, and five months before this Court denied certiorari. North Carolina's pattern jury instructions were not updated to incorporate ***Kirkley's*** unanimity requirement until February of 1985. N.C.P.I.--Crim. §150.10 (Repl. Feb. 1985).

2 In fact, the sentencing instructions are not identical since in ***McKoy*** the trial court specifically charged the jury that it had to be unanimous to find each mitigating circumstance, ***McKoy v. North Carolina***, 494 U.S. at 436, whereas here the judge only alluded to the unanimity requirement in relation to the second main issue -- whether the jurors found one or more of the specified mitigating circumstances. (App. A28, A34-A39) It was not until the jury returned with a question about Issue Two that the judge clarified that the jury had to be unanimous in order to find a mitigating circumstance. (App. A42-A43)

tivity analysis in ***Teague***. (App. A9, A17) The panel avoided ***Teague*** by concluding that the rules in ***Mills*** and ***McKoy*** meet the second **Teague** exception for "bedrock procedural elements" and are "implicit in ordered liberty" such that they should be applied retroactively to Williams' already final death sentence. (App. A16-A17) The panel also held, as an alternative ground for its decision, that ***Teague's*** retroactivity analysis is not jurisdictional in nature, but is an affirmative defense which must be asserted below to the district court or else is deemed to be waived, citing ***Hanrahan v. Greer***, 896 F.2d 241, 245 (7th Cir. 1990). (App. A17-A23) The panel concluded that since the State did not raise the retroactivity issue at the District Court level, and did not assert ***Teague*** on appeal until after ***McKoy*** was decided, the State waived any ***Teague*** defenses to the retroactive application of ***Mills*** and ***McKoy***. Circuit Judge Widener separately concurred in the result (***Mills*** and ***McKoy*** retroactive under second ***Teague*** exception), but "would hold that the State did not waive the ***Teague*** question as a defense." (App. A24)

I. THE FOURTH CIRCUIT'S EXTRAORDINARY HOLDING THAT *MILLS* AND *MCKOY* MAY BE APPLIED RETROACTIVELY UNDER *TEAGUE'S* SECOND EXCEPTION CONFLICTS WITH THIS COURT'S OWN EIGHTH AMENDMENT JURISPRUDENCE, AS WELL AS WITH OTHER CIRCUIT COURTS, AND THEREFORE CERTIORARI REVIEW IS NECESSARY TO RESOLVE THIS IMPORTANT ISSUE OF CONSTITUTIONAL LAW.

In ***Teague***, which was decided over five months ***after*** the federal district court denied Williams' habeas petition, this Court adopted for the first time the principle that "new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." ***Penry v. Lynaugh***, 492 U.S. 302, 313 (1989), ***citing***, ***Teague v. Lane***, 489 U.S. at 311-13. The

Fourth Circuit seized upon ***Teague***'s second exception for "watershed rules of criminal procedure," ***Teague v. Lane***, 489 U.S. at 311-14, and applied ***Mills*** and ***McKoy*** retroactively to Williams' death sentence, equating ***Mills*** and ***McKoy*** with such "bedrock procedural elements" as ***Gideon v. Wainwright***, 372 U.S. 335 (1963) (right to counsel):

> Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same "primacy and centrality" of ***Gideon***.

(App. A17) However, in ***Sawyer v. Smith***, 497 U.S. 227, 110 S.Ct. 2822 (1990), this Court declined to interpret this second exception broadly and reemphasized that because the second ***Teague*** exception is directed "only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" ***Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2831, ***quoting***, ***Teague v. Lane***, 489 U.S. at 313.

Sawyer expressly refused to extend ***Teague***'s second exception to the new rule of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985). Even though it was designed to enhance the accuracy of capital sentencing, the ***Caldwell*** rule did not meet the "bedrock procedural elements" requirement of an "absolute prerequisite to fundamental fairness." ***Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2832, ***quoting***, ***Teague v. Lane***, 489 U.S. at 314.

> It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, petitioner has not suggested any Eighth Amendment rule that would not be sufficiently "fundamental" to qualify for the

> proposed definition of the exception, and at oral argument in this case counsel was unable to provide a single example. [citation omitted] In practical effect, petitioner asks us to overrule our decision in ***Penry*** that ***Teague*** applies to new rules of capital sentencing. This we decline to do.

Sawyer v. Smith, 497 U.S. at ___, 110 S.Ct. at 2832. ***McKoy*** already had been decided by the time this Court handed down ***Sawyer***, but was not cited as an example of a new rule meeting ***Teague***'s second exception for "bedrock" principles.

The Fourth Circuit nevertheless reasoned that ***Mills*** and ***McKoy*** met the test for "bedrock procedural elements" since the procedures they invalidated have been described as "arbitrary" and "capricious." (App. A16-A17, ***citing***, ***McKoy v. North Carolina***, 494 U.S. at 454 (Kennedy, J., concurring)) The Fourth Circuit's decision is the first known case applying ***Teague***'s second exception in the Eighth Amendment context. Except for the ***Caldwell*** rule in ***Sawyer***, this Court directly has not addressed the definition of a "bedrock" Eighth Amendment principle under **Teague's** second exception, and this case provides an ideal vehicle for such analysis. Moreover, as this Court noted in ***Sawyer***, the "practical effect" of the Fourth Circuit's decision casts significant doubt on the continued viability of ***Teague*** to alleged errors in capital sentencing instructions.

The ***Mills/McKoy*** rule is not an "'absolute prerequisite to fundamental fairness,' (citation omitted), of the type that may come within ***Teague***'s second exception." ***Sawyer v. Smith***, 497 U.S. at ____, 110 S.Ct. at 2832. As in ***Saffle v. Parks***, 494 U.S. 484 (1990), which challenged an antisympathy capital sentencing instruction, the unanimity requirement found to be unconstitutional in ***Mills*** and ***McKoy*** concerned "***how*** [the jury] must consider the mitigating evidence, not "***what*** mitigating evidence the jury must be permitted to consider in making its sentencing decision." ***Saffle v. Parks***, 494 U.S. at 490 (emphasis in original).

"What petitioner complains of here is not a limitation upon what the sentencer was allowed to give effect to, but rather a limitation upon the ***manner*** in which it was allowed to do so--viz., only unanimously." ***McKoy v. North Carolina***, 494 U.S. at 465-66 (Scalia, J., dissenting). Possible examples of "bedrock" rules in the capital sentencing context include ***Gregg v. Georgia***, 428 U.S. 153 (1976) (bifurcated proceeding allowing jury to consider evidence relevant to sentence does not violate Eighth Amendment), or ***Woodson v. North Carolina***, 428 U.S. 280 (1976) (mandatory death penalty unconstitutional). In contrast, ***Mills*** and ***McKoy*** do not constitute an emerging component of basic due process "without which the likelihood of an accurate conviction [or death sentence] is seriously diminished." ***Teague v. Lane***, 489 U.S. at 313. In fact, both decisions are premised entirely upon the mere ***possibility*** that a hypothetical juror ***may*** have been precluded from finding and considering mitigating evidence or a mitigating circumstance, not that such preclusion did occur in a specific case. In the context of whether it would be a "fundamental miscarriage of justice" not to overlook a procedural default of a claim based on ***Caldwell***, this Court recently stated:

> Demonstrating that an error is by its nature the kind of error that ***might have affected*** the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989) (emphasis added). Similarly, the ***Mills/McKoy*** rule does not equate to "bedrock procedural elements" such as the right to counsel recognized in ***Gideon***. Contrary to the Fourth Circuit's suggestion, the ***Mills/McKoy*** rule striking down the unanimity requirement for mitigating circumstances is not "implicit in the concept of ordered liberty." (App. A15, ***quoting***, ***Teague v. Lane***, 489 U.S. at 307) "Whatever one may think of the importance of [Williams'] proposed rule, it has none of the primacy and centrality of the rule

adopted in ***Gideon*** or other rules which may be thought to be within the exception." ***Saffle v. Parks***, 494 U.S. at 495.

Other recent federal court decisions which have addressed the retroactivity of ***Mills*** and ***McKoy*** under ***Teague*** have reached a different conclusion than the Fourth Circuit.[3]

In ***Thomas v. Jones***, 742 F.Supp. 598 (S.D. Ala. 1990), ***aff'd***, ____ F.2d ____ (11th Cir., July 11, 1990) (unpublished), ***cert. and stay denied***, ____ U.S. ____, 111 S.Ct. 1 (1990), Chief United States District Judge Alex Howard, Jr., of the United States District Court for the Southern District of Alabama--Southern Division, held that ***Mills*** and ***McKoy*** announced a "new rule" under ***Teague***, and since the new rule does not come within either of the two narrow exceptions to the non-retroactivity doctrine of ***Teague***, the habeas petitioner (Wallace Norrell Thomas) "was not entitled to its retroactive application." ***Thomas v. Jones***, 742 F.Supp. at 602. Thomas since has been executed by the State of Alabama.

In ***Cordova v. Collins***, 953 F.2d 167 (5th Cir. 1992), the Fifth Circuit agreed that ***Mills*** was a new rule which was not dictated by precedent at the time Cordova's conviction became final, and thus was barred by ***Teague***. ***Cordova v. Collins***, 953 F.2d at 173.

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3 Relying on language in ***McDougall v. Dixon***, 921 F.2d 518, 539 (4th Cir. 1990), ___ U.S. ___, 111 S.Ct. 2840 (1991), the lower federal district courts in North Carolina have held the ***Mills/McKoy*** claim is not cognizable on federal habeas review pursuant to ***Teague***. ***Smith v. Dixon***, 766 F.2d 1370, 1377-78 (E.D.N.C. 1991), ***appeal pending***, Nos. 91-4011, -4012 (4th Cir.); ***Gardner v. Dixon***, No. C-88-179-WS (M.D.N.C., Sept. 11, 1991) (Slip op. at 64-68), ***aff'd***, ___ F.2d ___, No. 91-4010 (4th Cir., June 4, 1992); ***Lawson v. Dixon***, No. C-88-738-S (M.D.N.C., Jan. 7, 1992) (Slip op. at 29-35), ***appeal pending***, No. 92-4003, -4004 (4th Cir.).

There are no known decisions agreeing with the Fourth Circuit's ***Teague*** analysis of ***Mills*** and ***McKoy***. In ***Zettlemoyer v. Fulcomer***, 923 F.2d 284, 306 n. 19 (3rd Cir.), ***cert. denied***, ____ U.S. ____, 112 S.Ct. 280 (1991), the Third Circuit panel majority did not engage in a ***Teague*** retroactivity analysis, preferring instead to address the merits and find the non-explicit instructions distinguishable from ***Mills***. However, Circuit Judge Sloviter, though dissenting from the panel majority on the issue whether the sentencing instructions were ambiguous on the unanimity requirement and therefore violated ***Mills***, would have held that the ***Mills*** claim was ***Teague***-barred: "I believe it is likely that the Supreme Court would view ***Mills*** as announcing a new rule and thus this claim also is subject to the almost insurmountable barrier on retroactive application announced in ***Teague***." ***Zettlemoyer v. Fulcomer***, 923 F.2d at 317 n. 3.

The ***Williams*** decision applying ***Mills*** and ***McKoy*** retroactively potentially could affect not only 17 other North Carolina cases[4] which already were final when ***Mills*** was decided, but also

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4 ***State v. Zuniga***, 320 N.C. 233, 357 S.E.2d 898, **cert. denied**, 484 U.S. 959 (1987); ***State v. (Thomas Jack) Brown***, 320 N.C. 179, 358 S.E.2d 1, ***cert. denied***, 484 U.S. 970 (1987); ***State v. Robbins***, 319 N.C. 465, 356 S.E.2d 279, **cert. denied**, 484 U.S. 918 (1987); ***State v. (Willie) Brown***, 315 N.C. 40, 337 S.E.2d 808 (1985), ***cert. denied***, 476 U.S. 1165 (1986); ***State v. Huffstetler***, 312 N.C. 92, 322 S.E.2d 110 (1984), ***cert. denied***, 471 U.S. 1009 (1985); ***State v. Noland***, 312 N.C. 1, 320 S.E.2d 642 (1984), ***cert. denied***, 469 U.S. 1230, ***reh'g denied***, 471 U.S. 1050 (1985); ***State v. Gardner***, 311 N.C. 489, 319 S.E.2d 591 (1984), ***cert. denied***, 469 U.S. 1230 (1985), ***denial of habeas relief affirmed in, sub nom., Gardner v. Dixon***, ___ F.2d ___, No. 91-4010 (4th Cir., June 4, 1992) (petition for reh'g pending, filed June 18, 1992); ***State v. Boyd***, 311 N.C. 408, 319 S.E.2d 189 (1984), ***cert. denied***, 471 U.S. 1030 (1985); ***State v. Lawson***, 310 N.C. 632, 314 S.E.2d 493 (1984), ***cert. denied***, 471 U.S. 1120 (1985), ***habeas relief denied in, sub nom., Lawson v. Dixon***, No. C-88-738-S (M.D.N.C., Jan. 7, 1992), ***appeal pending***, ___ F.2d ___, Nos. 92-4003, -4004 (4th Cir.); ***State v. Anthony and Craig***, 308 N.C. 446, 302 S.E.2d 740, ***cert. denied***, 464 U.S. 908 (1983); ***State v. Brown***, 306 N.C. 151, 293 S.E.2d 569 (1982), ***cert. denied***, 459 U.S. 1080 (1982); ***State v. Pinch***, 306 N.C. 1, 292 S.E.2d 203 (1982), ***cert. denied***, 459 U.S. 1056, ***reh'g denied***, 459 U.S. 1189 (1982); ***State v. Smith***, 305 N.C. 691, 292 S.E.2d 264 (1982), **cert. denied**, 459

similar claims in other circuits and states. ***See, e.g., James v. Whitley***, 926 F.2d 1433, 1446-49 (5th Cir. 1991); ***Kordenbrock v. Scroggy***, 919 F.2d 1091, 1120-21 (6th Cir. 1990) (***en banc***), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 1608 (1991); ***State v. Petary***, 790 S.W.2d 243, 244-46 (Mo. banc 1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 443 (1990); ***People v. Rodriguez***, 794 P.2d 965, 980-81 (Colo. 1990), ***citing***, ***People v. Davis***, 794 P.2d 159, 194-96 (Colo. 1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 770 (1991); ***State v. Green***, ___ S.C. ___, ___, 392 S.E.2d 157, 163 (1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 229, ***reh. denied***, ___ U.S. ___, 111 S.Ct. 548 (1990); ***State v. Patterson***, 299 S.C. 280, 286, 384 S.E.2d 699, 703 (1989), ***cert. granted, judgment vacated, and remanded for further consideration on other grounds***, ___ U.S. ___, 110 S.Ct. 709 (1990), ***reaffirmed in***, ___ S.C. ___, 396 S.E.2d 366 (1990); ***Ex parte Martin***, 548 So.2d 496, 498 (Ala. Cr. App. 1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 419 (1989); ***Commonwealth v. Frey***, 520 Pa. 338, 346-48, 554 A.2d 27, 30-31 (1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 1500 (1990); ***State v. Clark***, 108 N.M. 288, 772 P.2d. 322 (1989). ***But see, State v. Henderson***, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990) ***Cf., Rodriguez v. Colorado***, ___ U.S. ___, ___, 111 S.Ct. 770, 770-73 (1991) (Marshall, J., dissenting from denial of certiorari on issue whether Colorado capital sentencing instructions, which required unanimity only as to findings of aggravating circumstances and did not provide for voting upon existence of mitigating circumstances, violated ***Mills*** and ***McKoy***); ***House v. Tennessee***, ___ U.S. ___, ___, 111 S.Ct. 284, 284-87 (1990) (Marshall, J., dissenting from denial of certiorari on issue whether

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(Footnote Continued)

U.S. 1056 (1982), ***habeas relief granted on other ground sub nom., Smith v. Dixon***, 766 F.Supp. 1370 (E.D.N.C. 1991), ***appeal pending***, ___ F.2d ___, Nos. 91-4011, -4012 (4th Cir.); ***State v. Williams***, 305 N.C. 656, 292 S.E.2d 243 (1982), ***cert. denied***, 459 U.S. 1056, ***reh'g denied***, 459 U.S. 1189 (1982); ***State v. Taylor***, 304 N.C. 249, 283 S.E.2d 761 (1981), ***cert. denied***, 463 U.S. 1213, ***reh'g denied***, 463 U.S. 1249 (1983); ***State v. Oliver***, 302 N.C. 28, 274 S.E.2d 183 (1981), ***appeal following remand***, 309 N.C. 326, 307 S.E.2d 304 (1983).

Tennessee capital sentencing instructions, which did not require jury to list or vote upon the specific mitigating factors and required unanimity only as to the finding of aggravating circumstances, violated ***Mills*** and ***McKoy***). ***Compare***, ***Kubat v. Thieret***, 867 F.2d 351, 371-74 (7th Cir.) (Illinois trial court's instructions which required unanimous agreement as to the sufficiency of mitigating factors to preclude death sentence held to violate ***Mills***), ***cert. denied sub nom.***, ***Kubat v. Greer***, ___ U.S. ___, 110 S.Ct. 206 (1989).

If review of the Fourth Circuit's decision is denied, federal and state courts will be compelled on post-conviction review to extensively analyze the various sentencing instructions in already final cases for possible ***Mills/McKoy*** error, rather than simply hold that petitioners may not benefit retroactively from these decisions. Therefore, the Fourth Circuit's unprecedented holding applying the ***Mills/McKoy*** rule retroactively as a "bedrock" principle conflicts with **Sawyer** and other federal court decisions, and this important issue warrants resolution by the granting of certiorari.

II. THE FOURTH CIRCUIT'S DECISION ON NON-RETROACTIVITY AS AN AFFIRMATIVE DEFENSE ADOPTS A POSITION WHICH IS IN CONFLICT WITH THE MAJORITY OF THE OTHER CIRCUITS ON THIS ISSUE, AND RAISES AN IMPORTANT ISSUE WARRANTING REVIEW ON CERTIORARI.

The panel's decision that ***Teague*** and the principles of non-retroactivity are an affirmative defense and therefore must be raised as such by the respondent to a habeas action also warrants resolution on certiorari review. In ***Penry v. Lynaugh***, 492 U.S. at 313, this Court suggested that a federal habeas court must conduct the ***Teague*** retroactivity analysis as a "threshold" matter, before

reaching, for example, the issues of abuse of the writ or the merits. In ***Teague*** itself, the Court addressed the question of retroactivity ***sua sponte*** even though it had been raised only in an ***amicus*** brief. ***Teague v. Lane***, 489 U.S. at 300. Likewise, the Court addressed the retroactivity issue ***sua sponte*** in ***Saffle v. Parks***, ***supra***. ***Saffle v. Parks***, 494 U.S. at 496 n. 1 (Brennan, J., dissenting) ("Although the case was briefed and argued after ***Teague***, neither of the parties nor any ***amicus*** briefed the retroactivity issue."). ***See also Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2826 (noting that after hearing ***en banc*** oral argument, the Fifth Circuit requested supplemental briefing from the parties on the question whether the intervening decision in ***Teague*** barred Sawyer's claim for relief under ***Caldwell***). The panel dismissed these precedents based on the subsequent decision in ***Collins v. Youngblood***, 497 U.S. 37, 110 S.Ct. 2715 (1990), wherein the Court remarked that "[a]lthough the ***Teague*** rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, ***must*** raise and decide the issue ***sua sponte***." ***Collins v. Youngblood***, 497 U.S. at ___, 110 S.Ct. at 2718 (emphasis in original). However, the fact that ***Teague*** is not "jurisdictional" does not dictate that ***Teague*** is an affirmative defense which must have been raised in the first instance at the district court level. In ***Collins***, the State of Texas did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument counsel answered that Texas had chosen not to rely on ***Teague***. ***Id***. At most, ***Collins*** suggests that this Court would have addressed the ***Teague*** issue if Texas had briefed it, or at least not eschewed it.

Therefore, this Court has not yet decided whether a state waives the ***Teague*** defense by failing to timely raise it either in the federal district court or on appeal to the circuit court. ***See*** Marc M. Arkin, ***The Prisoner's Dilemma; Life in the Lower Federal Courts After Teague v. Lane***, 69 N.C.L.Rev. 371, 415-16 (1991) ("The question of when the government may waive a

Teague nonretroactivity defense is not clearly settled. . . While the Supreme Court has now decided that the government ***may*** explicitly waive a ***Teague*** nonretroactivity claim, it has not given the lower courts guidance regarding any other circumstances under which such a waiver should be found." (footnotes omitted)). Only two current Justices have suggested that a state should be deemed to waive the non-retroactivity defense if it failed to raise it in the lower federal court. ***Penry v. Lynaugh***, 492 U.S. at 349 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part) ("Nor am I at all sure that courts should decide the retroactivity issue if it was not raised below."); ***Zant v. Moore***, 489 U.S. 836, 837 (1989) (Blackmun, J., dissenting) (State of Georgia waived the non-retroactivity defense by failing to raise it in the lower federal courts).

The circuit courts which directly have addressed the waiver issue are sharply divided whether it is appropriate to consider the ***Teague*** analysis without the issue having been raised by the parties. ***Compare***, ***e.g.***, ***Smith v. Black***, 904 F.2d 950, 981 n. 12 (5th Cir. 1990) (***Teague*** issue may be considered though not raised by the state until supplemental briefing), ***cert. granted and judgment vacated on other grounds***, ___ U.S. ___, 112 S.Ct. 1463 (1992); ***Hill v. McMackin***, 893 F.2d 810, 813 (6th Cir. 1989) (deciding application of ***Teague*** despite parties' failure to address issue), ***disapproved on other grounds***, ***Ylst v. Nunnemaker***, ___ U.S. ___, 111 S.Ct. 2590 (1991), ***as noted in***, ***Couch v. Jabe***, 951 F.2d 94, 96 (6th Cir. 1991) (***per curiam***); ***and***, ***Hopkinson v. Shillinger***, 888 F.2d 1286, 1288 (10th Cir. 1989) (***en banc***) (non-retroactivity is not waived and should be considered despite state's failure to interpose defense), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 3256 (1990), ***with***, ***Kordenbrock v. Scroggy***, 919 F.2d at 1104 n. 4 ("The state has waived any argument based on ***Teague***."); ***Hanrahan v. Greer***, 896 F.2d at 245 (State of Illinois waived non-retroactivity as a defense by raising it for the first time on appeal), ***later appeal sub nom.***, ***Hanrahan v. Thieret***, 933 F.2d 1328, 1337 n. 19 (7th Cir.), ***cert. denied***, ___ U.S. ___, 112 S.Ct.

446 (1991). On remand in ***Moore v. Zant***, 885 F.2d 1497 (11th Cir. 1989) (***en banc***), ***cert. denied***, ____ U.S. ____, 110 S.Ct. 3255 (1990), the Eleventh Circuit plurality, because of its abuse of the writ disposition of Moore's claims, did not address whether the State of Georgia had waived non-retroactivity as a defense. ***Moore v. Zant***, 885 F.2d at 1503. ***But compare***, ***Moore v. Zant***, 885 F.2d at 1519 n. 5 (Kravitch, J., dissenting) (***Teague*** is not an affirmative defense), **and**, ***Id.*** at 1524 (Johnson, J., dissenting) ("It appears that non-retroactivity is an affirmative defense"). ***See also Card v. Dugger***, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990) (disposing of ***Caldwell*** claim on basis of procedural default since district court did not address retroactivity and state had not raised it on appeal). Analogizing to ***Granberry v. Greer***, 481 U.S. 129 (1987), in which this Court discussed waiver by a state of the non-exhaustion defense, the Ninth Circuit recently took a different intermediary approach and held that a court of appeals has the discretion, but is not required to address the ***Teague*** defense which has been raised for the first time on appeal or, perhaps, even in a petition for rehearing. ***Boardman v. Estelle***, 957 F.2d 1523, 1534-37 (9th Cir. 1992) (opinion supplemented by denial of rehearing on Mar. 11, 1992), ***cert. pending***, ___ U.S. ___, No. 91-2006 (petition filed June 8, 1992). Therefore, this conflict and inconsistent analysis of ***Teague*** waiver by the circuit courts requires resolution, and this case presents an ideal vehicle for that decision.[5]

The panel's reliance on ***Hanrahan***, in addition to being the minority position, was inappropriate since ***Hanrahan*** is distinguishable on its facts. In ***Hanrahan***, the intervening decision

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5 The panel's citation to and reliance on ***Maynard v. Dixon***, 943 F.2d 407, 418 (4th Cir. 1991), ***cert. denied***, ____ U.S. ____, 112 S.Ct. 1211 (1992), for the proposition that the State may be deemed to waive the defense of non-retroactivity (App. A23), is surprising since the panel in ***Maynard*** merely made the assumption, "***without deciding***." The same waiver of the ***Teague*** defense also was pending in Williams' case, and therefore the ***Maynard*** panel obviously chose to address the merits rather than rely on ***Teague***.

in ***Cruz v. New York***, 481 U.S. 186 (1987) was announced while Hanrahan's habeas petition still was pending in the district court. The district court asked the parties for briefs on the effect of ***Cruz***, but the State "tackled the merits without suggesting that ***Cruz*** should not be applied to Homer's case." ***Hanrahan v. Greer***, 896 F.2d at 245. Here, in contrast, until ***McKoy*** was announced on March 5, 1990 there was not yet a "new rule" as to North Carolina's capital sentencing instructions which the State could have defended as non-retroactive. The federal and state courts, even after ***Mills*** was decided on June 6, 1988, continued to believe that ***Mills*** had no direct bearing on North Carolina's sentencing instructions. ***State v. McKoy***, 323 N.C. 1, 30-44, 372 S.E.2d 12, 27-36 (1988), ***rev'd and remanded sub nom.***, ***McKoy v. North Carolina***, 494 U.S. 433 (1990). In other words, this Court did not make clear until ***McKoy*** that there was to be a "new rule" which the State should seek to defend as non-retroactive, even on pre-***Teague*** grounds.

Moreover, the State's Answer to Williams' habeas petition in the District Court was filed on November 25, 1987. The District Court's judgment denying relief was entered on September 13, 1988, well before this Court decided ***Teague*** on February 22, 1989. It was not until June 26, 1989, well after the District Court had issued its Judgment denying Williams' habeas petition, that this Court issued its decision in ***Penry***, holding that the non-retroactivity principles of ***Teague*** apply to capital cases on federal habeas review. Finally, at the time of the State's initial briefing and through the announcement of the ***McKoy*** decision on March 5, 1990, the definition of a "new rule" under ***Teague*** still was in doubt.

Consequently, the State could not have raised the ***Teague*** defense in the District Court since it simply did not yet exist at the time. "Arguably, the state could have raised the defense of non-retroactivity on other grounds, but they would have been largely irrelevant to the analysis required by ***Teague***." ***Hopkin-***

son v. Shillinger, 888 F.2d at 1288. Indeed, ***Penry*** clouded whether ***Mills*** and the pending decision in ***McKoy*** might be a "new rule" or merely an application of ***Lockett*** and ***Eddings v. Oklahoma***, 455 U.S. 104 (1982). Subsequent to the State's briefing and the oral arguments in November of 1989, this Court announced a number of significant decisions refining and clarifying the retroactivity principles of ***Teague***, including ***Saffle***, ***Sawyer***, and ***Butler v. McKellar***, 494 U.S. 407 (1990). While ***Teague*** and its progeny may not have created a new defense "which was previously unavailable to the State," ***Moore v. Zant***, 885 F.2d 1497, 1525 (11th Cir. 1989) (***en banc***) (Johnson, J., dissenting), it was only after the recent decisions in ***Butler*** and ***Saffle***, which were decided the same day as ***McKoy***, that the applicability of the ***Teague*** principles to Williams' claim was clarified. ***Butler*** expanded the concept of a "new rule" to include one that was "susceptible to debate among reasonable minds" under law prevailing at the time the habeas petitioner's conviction became final. In his ***Saffle*** dissent, former Justice Brennan obviously appreciated the importance of ***Butler's*** holding in relation to ***Teague*** and ***Penry***, even commenting that ***Butler*** itself constituted a "new standard" and was "novel." ***Saffle v. Parks***, 494 U.S. at 497 (Brennan, J., dissenting). ***Saffle***, and more recently ***Sawyer***, have made clear that the application of ***McKoy*** sought by Williams is not dictated by ***Lockett*** and ***Eddings***, and that the ***Mills/McKoy*** rule does not meet ***Teague's*** second exception for "bedrock procedural elements." The State raised the non-retroactivity issue as to Williams' ***McKoy*** claim as soon as reasonably possible after the decisions in ***Butler*** and ***Saffle*** made the defense plausible. Under the circumstances, the State could not have "missed the boat," as the panel colorfully suggests (App. A23), when the ticket for the boat had not even been printed. Therefore, this Court should grant certiorari to resolve the conflict whether a federal appellate court may address the ***Teague*** retroactivity question if the state failed to raise the issue in the district court.

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit which vacated Williams' death sentence and remanded his case for a new capital sentencing proceeding.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,
Petitioners,

v.

DOUGLAS WILLIAMS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOUGLAS WILLIAMS, JR., Petitioner-Appellant, v. GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA, Respondents-Appellees.	)	No. 89-4001

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (CA-87-985-HC)

Argued: April 8, 1991

Decided: March 13, 1992

Before ERVIN, Chief Judge, WIDENER, Circuit Judge, and Butzner, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Chief Judge Ervin wrote the majority opinion, in which Senior Judge Butzner joined. Judge Widener wrote a concurring opinion.

COUNSEL

ARGUED: Mark Evan Olive, Atlanta, Georgia, for Appellant. Barry Steven McNeill, Special Deputy Attorney General, Joan Herre Byers, Special Deputy Attorney General, Raleigh, North Carolina, for Appellees. **ON BRIEF:** William F. Larimar, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, Chapel Hill, North Carolina, for Appellant. Lacy H. Thornburg, Attorney General of North Carolina, Raleigh, North Carolina, for Appellees.

OPINION

ERVIN, Chief Judge:

Douglas Williams, Jr. appeals the district court's denial of his petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. The core of Williams' arguments is that he did not have the mental capacity-because of organic brain damage and severe intoxication at the time of the offense-to have the requisite specific intent to be convicted of first-degree murder and sentenced to death. More specifically, he argues that he was not given the opportunity to prove that he lacked the requisite mental capacity-because of either ineffective assistance of counsel, or some other violation of his rights either at trial, at sentencing, on appeal, or in the post-conviction proceedings.

After this appeal was argued, the United States Supreme Court declared unconstitutional the North Carolina jury instruction requiring unanimity among the jurors before they could consider mitigating circumstances in death penalty sentencing deliberations. ***McKoy v. North Carolina***, 494 U.S. ___, 110 S. Ct. 1227 (1990). This jury instruction was given at Williams' trial. We affirm the district court's holding that the trial court did not commit constitutional error at the guilt phase of the trial; therefore, we do not disturb Williams' conviction. We further hold that Williams may receive the benefit of the rule set out in ***McKoy***; therefore, we vacate his sentence and remand to the district court.

I

On August 2, 1981, Williams was arrested and charged with the murder of Adah Herndon Dawson. A detailed description of the crime and the investigation leading to his arrest is set forth in ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335, 339-341 (1983). Williams pled not guilty. The jury found Williams guilty of first-degree murder. It concluded that he had murdered Dawson during the perpetration of a first-degree burglary, as well as during the perpetration of a sex offense, and that the murder was committed with malice and premeditation and deliberation. After the sentencing hearing, the jury imposed the death penalty which was ordered by the trial court judge.

On appeal, the conviction was upheld by the North Carolina Supreme Court on April 5, 1983. ***Williams***, 308 N.C. 47, 301 S.E.2d 335 (1983). The United States Supreme Court denied Williams' Petition for Writ of Certiorari on October 3, 1983. ***Williams v. North Carolina***, 464 U.S. 865 (1983). Williams' Petition for Rehearing was denied on November 28, 1983. ***Williams v. North Carolina***, 464 U.S. 1004 (1983).

On May 7, 1984, Williams filed a Motion for Appropriate Relief, a state post-conviction procedure, pursuant to N.C.G.S. §15A-1411 *et seq*. Twenty-one claims for relief were alleged in the motion, including ineffective assistance of counsel at trial and on appeal. During these proceedings, Williams new counsel filed numerous motions, all of which were denied by the state court judge.[1] The court did order that an evidentiary hearing be held on one claim-ineffective assistance of counsel at trial-and that Williams' remaining claims would "be heard on the record before the court and oral arguments."

The evideniary hearing was held on June 4-5, 1985, after which the state court judge entered an order denying Williams' post-conviction relief. The North Carolina Supreme Court denied Williams' petition for discretionary review.

On October 13, 1987, Williams filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of North Carolina. The petition contained twenty-four claims for relief. The judge denied the petition without oral argument on September 13, 1988. From this denial of habeas corpus relief, Williams now appeals.

---

1 These included a Motion to Provide Funds for Experts and Investigative Assistance, a Motion to Produce Exculpatory Information, a Motion for Finding of Indigency, and a Motion for Independent Psychiatric Testing.

II

Williams raises three issues arising from the guilt phase of his trial. First, he contends that the imposition of the death penalty upon a mildly mentally retarded defendant violates the constitution. Second, he alleges that he did not receive effective assistance of counsel. Third, he asserts that the evidence was insufficient to support the jury's verdict finding Williams guilty of first-degree murder. We find no merit in any of these arguments.

A

The Supreme Court in ***Penry v. Lynaugh***, 492 U.S. 302 (1989), held that the execution of a mentally retarded defendant convicted of a capital offense is not categorically prohibited by the Eighth Amendment. This precedent forecloses this issue.

B

The standard by which to judge claims alleging ineffective assistance of counsel is set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The standard in ***Strickland*** consists of two prongs. First, the court must inquire into the competence of the legal assistance in question. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Id.*** at 688. In this regard, an attorney's conduct is to be accorded a great deal of deference, and a reviewing court should avoid second-guessing the attorney with the benefit of hindsight. The second prong of the test involves assessing whether, given that counsel's assistance was constitutionally deficient, this fact had a reasonable probability of affecting the outcome. In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

Williams specifically argues three major errors in his representation. First, that his attorney should have sought out available witnesses who saw Williams staggering drunk near the time of the offense. Second, that he should have discovered readily available mental health experts who diagnosed Williams as mentally retarded and brain damaged at the time of the offense and who would testify that Williams' mental condition satisfied the test for statutory and nonstatutory mitigation. Third, the attorney unreasonably introduced Williams' nine prior convictions during his capital sentencing argument, even though the State could not have introduced the convictions.

After careful review of the record, we agree that Williams' attorney could have perhaps investigated the facts of the case more thoroughly and with more diligence. However, we cannot conclude that his conduct was unreasonable without engaging in excessive second-guessing, which we refuse to do. Moreover, in light of the evidence, we believe that the government has carried its burden of showing beyond a reasonable doubt that the verdict would not have been different even if Williams' counsel had been more diligent or had used different trial tactics. ***See Smith v. United States***, 60 U.S.L.W. 3434 (U.S. Dec. 17, 1991) (denial of certiorari) (Blackman, J., dissenting, and Stevens, J., dissenting).

C

We find the evidence to be sufficient to support the jury's verdict. In his confession, Williams stated that when he entered the Dawson house, he was looking for a place to sleep and thought that the house was deserted. Once inside, he was surprised by Dawson, who threw salt in his face. While in a state of alcohol and drug intoxication, he struck her with a stick he picked up on

the porch, knocking her down. After rummaging through the house, he went back into the kitchen and forced a mop handle into her vagina. The medical examiner found that Mrs. Dawson had severe cuts on her neck, face, scalp, ears, vagina, and rectum. She also had fractures of the skull, pubic bones, hip bones, and some facial bones.

Williams now argues that his confession contains no evidence of any deliberation or premeditation to kill Dawson. Furthermore, he claims he had no "intent to commit larceny" when he entered the house and thus could not be convicted of felony-murder with the underlying felony being burglary. In addition, he contends that the murder was not "in perpetration of" a sex offense.

As the district court found, these arguments have little merit. We find particularly weak the argument that this murder was not committed "in perpetration of" a sex offense. The nexus between the sex act and the murder that Williams claims is required for felony-murder is much too restrictive and burdensome. *See* ***State v. Williams***, 308 N.C. at 67, 301 S.E.2d at 348; ***State v. Powell***, 299 N.C. 95, 261 S.E.2d 114 (1980).

III

In his sentencing instructions, the judge listed the following considerations as possible mitigating factors: Williams' age; his mental problems and deficiencies; and his condition the night of the murder (allegedly intoxicated and under the influence of drugs).

In the sentencing proceedings, the jury was asked to answer unanimously four questions: (1) whether there were any aggravating factors (proved by the State); (2) whether there were any mitigating factors (proved by Williams); (3) whether the

aggravating circumstances outweighed the mitigating circumstances; and (4) whether the aggravating circumstances were sufficiently substantial to justify the imposition of the death penalty. At the time of Williams' trial, a North Carolina capital sentencing jury was required to "unanimously find that a mitigating circumstance exist[ed] before it [could] be considered for the purpose of sentencing." ***State v. Kirkley***, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983).

This unanimity requirement was struck down by the United States Supreme Court in ***McKoy v. North Carolina***, ___ U.S. ___, 110 S.Ct. 1227 (1990). Following its reasoning in ***Mills v. Maryland***, 486 U.S. 367 (1988), the Court held that such a sentencing scheme "created 'a substantial probability that reasonable jurors ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular [mitigating] circumstance.'" ***McKoy***, 110 S.Ct. at 1230 (quoting ***Mills***, 486 U.S. at 384). The law is well established in this area that "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death.'" ***Eddings v. Oklahoma***, 455 U.S. 104, 110 (1982) (quoting ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978)). Under ***McKoy***, the unanimity requirement given to the jury at Williams' sentencing proceedings did limit the individual juror's consideration of mitigating circumstances and was, therefore, unconstitutional.

Since the United States Supreme Court's ***McKoy*** opinion, the North Carolina Supreme Court has held that that decision did not completely invalidate the North Carolina death penalty statute. *See* ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990) ("***McKoy II***"). Consequently, Williams is not entitled to have his sentence automatically reduced to life imprisonment. As a result,

we must determine whether Williams can benefit from the rules set out by the Supreme Court in ***McKoy*** and its predecessor ***Mills***.

A

Williams' conviction became final in 1983,[2] ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, *reh'g denied*, 464 U.S. 1004 (1983), before the decisions in the ***Mills*** and ***McKoy*** cases were handed down. Therefore, under the Supreme Court's holdings in ***Teague v. Lane***, 489 U.S. 288 (1989), and ***Penry v. Lynaugh***, 492 U.S. 302 (1989), if the decisions in ***Mills*** and ***McKoy*** are deemed to be "new rules," then Williams cannot receive the benefit of those rules even though the jury instructions were identical to those struck down in ***McKoy***.

In ***Teague***, the Supreme Court adopted Justice Harlan's general rule on nonretroactivity for cases on collateral review, which he set out in ***Mackey v. United States***, 401 U.S. 667, 675 (1971) (separate opinion). The general rule is that "new rules" should not be applied retroactively to cases on collateral review. ***Teague***, 489 U.S. at 305. There are two exceptions to the general rule. The first is that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" ***Teague***, 489 U.S. at 307 (quoting ***Mackey***, 401 U.S. at 692 (separate opinion)). The second exception is that a new

---

2 The Supreme Court has defined final to mean where the judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for petition for certiorari has elapsed. ***Allen v. Hardy***, 478 U.S. 255, 258 n. 1 (1986) (quoting ***Linkletter v. Walker***, 381 U.S. 618, 622 n. 5 (1965)).

rule should be applied retroactively if it would "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction" and "without which the likelihood of an accurate conviction is seriously diminished." ***Id.*** at 311-313. In ***Penry v. Lynaugh***, 492 U.S. 302 (1989), the Court held that the "new rule" limitation on the exercise of habeas corpus jurisdiction applies in both capital and noncapital cases.

B

The **Teague** Court defined a new rule as follows:

> In general,...a case announces a new rule when it breaks new ground or imposes a new obligation on the states or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Teague, 489 U.S. at 301. Normally, because Williams seeks the benefit of the rules in ***Mills*** and ***McKoy***, we would first have to determine whether those rules constitute new rules under ***Teague***. However, in this case, we find that even if ***Mills*** and ***McKoy*** are new rules, one of the exceptions to the nonretroactivity rule applies. Therefore, we will not address whether ***Mills*** and ***McKoy*** are new rules at this time.[3]

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3 We note that a previous panel of this court made a statement on this issue in ***McDougall v. Dixon,*** 921 F.2d 518 (4th Cir. 1990). There, we held that ***McKoy*** did not apply to the defendant's case, ***id.*** at 539; however we went on to state the following:

> ***McKoy*** is an extension of ***Mills v. Maryland,*** which was decided eight years after McDougald's conviction. The

C

The first exception is that new rules will apply retroactively if they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." ***Teague,*** 489 U.S. at 307. The proscribed conduct in Williams' case is capital murder, and the prosecution of capital murder is not prohibited by ***Mills*** or ***McKoy***. ***See Butler v. McKellar***, ___ U.S. ___, 110 S. Ct. 1212, 1217 (1990) (noting that the prosecution of capital murder was not prohibited by the new rule in ***Arizona v. Roberson***, 486 U.S. 675 (1988)). Therefore, the first exception does not apply in this case.

The second exception, however, does apply to this case. "The precise contours of this exception may be difficult to discern,..." ***Saffle v. Parks***, ___ U.S. ___, 110 S.Ct. 1257, 1264 (1990). In a recent case, the Supreme Court further explained the scope of the second Teague exception as follows:

> In ***Teague***, we modified Justice Harlan's test to combine the accuracy element of the ***Desist*** test with the ***Mackey*** limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under ***Teague*** to say that a new rule is aimed at improving the accuracy of the trial.

[FOOTNOTE CONTINUED]
McDougall facts are not the same as ***McKoy*** , but even if they were, the ***McKoy*** and ***Mills*** cases represent new law and would not be applied retroactively on collateral review. ***Teague v. Lane***, 489 U.S. 288 109 S. Ct. 1060, 103 L. Ed 2d 334 (1989).

> More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a *proceeding*.

Sawyer v. Smith, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990) (quoting ***Teague***, 489 U.S. at 311).

One rule which is repeatedly cited as an example of a rule falling within the second exception is ***Gideon v. Wainwright***, 372 U.S. 335, which held that a defendant has the right to be represented by counsel in all criminal trials for serious offenses. ***Saffle***, 110 S.Ct. at 1264. New rules which lack the "primacy and centrality of the rule adopted in ***Gideon***" do not fall within the second ***Teague*** exception. *See* ***id***.

An example of a new rule which lacked the "primacy and centrality" of ***Gideon*** was the rule adopted in ***Caldwell v. Mississippi***, 472 U.S. 320 (1989). In ***Sawyer v. Smith***, the Supreme Court held that ***Caldwell*** was a new rule under ***Teague*** and did not fit either of the two exceptions. ***Sawyer,*** 110 S.Ct. 2822. ***Caldwell*** held that the Eighth Amendment prohibits the imposition of the death penalty by a sentencer that has been led to believe that the responsibility for determining the appropriateness of the defendant's capital punishment lies elsewhere. ***Caldwell***, 472 U.S. at 328-29. ***Sawyer*** argued that the second ***Teague*** exception "should be read to include new rules of capital sentencing that 'preserve the accuracy and fairness of capital sentencing judgments.'" ***Sawyer***, 110 S.Ct. at 2831. The Supreme Court disagreed because such a test disregarded the additional requirement that the rule must also "alter our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. ***Sawyer***, 110 S.Ct. at 2831. The Court then found that ***Caldwell*** failed to meet this latter requirement.

Sawyer is important because it shows that the rules in ***Mills*** and ***McKoy*** easily meet the first requirement of the second ***Teague*** exception that the new rule be aimed at improving the accuracy of the trial. In ***Sawyer***, the Court stated:

> All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.

Sawyer, 110 S. Ct. at 2831. In fact, it was because every Eighth Amendment case concerning capital punishment does meet the first requirement of the second ***Teague*** exception that the Court refused to adopt Sawyer's interpretation of the exception. The Court focused on the fact that ***Caldwell*** did not meet the second requirement, explaining:

> The ***Caldwell*** rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an "absolute prerequisite to fundamental fairness," 489 U.S. at 314, 109 S.Ct., at 1077, of the type that may come within ***Teague's*** second exception.

Sawyer, 110 S.Ct., at 2832. Because the ***Caldwell*** rule did not meet the "bedrock procedural elements" requirement, the rule did not fall within the second ***Teague*** exception, and Sawyer could not benefit from the new rule. ***Sawyer*** indicates that the rules adopted in ***Mills*** and ***McKoy*** meet the first requirement of the second ***Teague*** exception in that they are aimed at increasing the

accuracy of capital sentencing. *See* ***Sawyer***, 110 S.Ct. at 2831; *see also* ***Woodson v. North Carolina***, 428 U.S. 280, 305 (1976) (noting that because of the difference between a sentence of death and a sentence of life imprisonment, "there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case"). What we must decide is whether the ***Mills*** and ***McKoy*** rules meet the second requirement of the second ***Teague*** exception. Justice Harlan explained this second requirement in ***Mackey v. United States***:

> [I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

401 U.S. 667, 693 (1971). The rules in ***Mills*** and ***McKoy*** fit the above description.

"It is well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'" ***Woodson v. North Carolina***, 428 U.S. 280, 301 (1976) (quoting ***Trop v. Dulles***, 356 U.S. 86, 101 (1958) (plurality opinion)). In addition, the sentence of death is a punishment different in kind, rather than different in degree, from all other sanctions. *See id.* at 303-04; ***Furman v. Georgia***, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

The Supreme Court has repeatedly held that the imposition of death requires that the sentencing be individualized. *See* ***Sumner v. Shuman***, 483 U.S. 66, 75 (1987); ***Woodson***, 428 U.S. at 304. In ***Woodson***, the court stated:

> While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, *see* ***Trop v. Dulles***, 356 U.S. at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

428 U.S. at 304. *See also* ***Saffle***, *supra*, 110 S.Ct. at 1270 (Brennan, J., dissenting) ("The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing.").

In ***Sumner v. Shuman***, 483 U.S. 66 (1987), the Court traced the history of capital punishment cases. There, the Court explained that the "constitutional mandate of individualized determinations in capital-sentencing proceedings" caused the court to invalidate death sentences where the sentencer did not consider mitigating factors. ***Id***. at 75-76. The Court explained that the Eighth Amendment requires that mitigating evidence be presented to the sentencer and further requires the sentencer to listen to that evidence. ***Id***. at 76.

The discussions in ***Woodson*** and ***Sumner*** support the view that a rule striking down a unanimity requirement for mitigating circumstances is "implicit in the concept of ordered liberty," ***Teague***, 489 U.S. at 307 (quoting ***Palko v. Connecticut***, 302 U.S. 319, 325 (1937) (Cardozo, J.)). The language of ***Mills*** further enforces this view.

In ***Mills***, the Court addressed the possibility that under Maryland's sentencing scheme, one holdout juror could prevent the other eleven jurors from considering mitigating evidence. ***Mills***, 486 U.S. at 374. The Court rejected this scheme as arbitrary:

> Although jury discretion must be guided appropriately by objective standards, it would certainly be *the height of arbitrariness* to allow or require the imposition of the death penalty under the circumstances [where one holdout juror prevents the consideration of mitigating evidence].

Id. at 374 (emphasis added) (citations omitted).

In ***McKoy***, Justice Kennedy further explored the arbitrariness of the unanimity requirement. He stated that the application of the death penalty on the basis of a single juror's vote

> ...represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in ***Mills*** described such a result as the "height of arbitrariness." Given this description, it is apparent that the result in ***Mills*** fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 110 S.Ct. at 1239 (Kennedy, J., concurring) (citations omitted).

We find that the rules set out in ***Mills*** and ***McKoy*** are "bedrock procedural elements" and are "implicit in ordered

liberty." The procedures they struck down have been described as "arbitrary" and "capricious." Those procedures did not provide for the "fundamental respect for humanity underlying the Eighth Amendment." ***Woodson***, 428 U.S. at 304. Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same "primacy and centrality" of ***Gideon***. Therefore, we hold that the ***Mills*** and ***McKoy*** rules fall within the second ***Teague*** exception and should be applied retroactively. Applying ***Mills*** and ***McKoy*** to Williams' case, we find that the jury instructions in this case were constitutionally defective. At sentencing, the court required the jury to unanimously find the existence of mitigating circumstances.[4] This unanimity requirement was identical to the unanimity requirement struck down as unconstitutional by the Supreme Court in ***McKoy***. *See* ***McKoy***, 110 S.Ct. at 130. *Cf.* ***Maynard***, *supra*, slip op. at 22. Therefore, under ***McKoy***, the jury instructions in this case were unconstitutional. As a result, we must vacate the sentence of death imposed upon Williams as unconstitutional due to the defective instructions. Accordingly, we vacate Williams' sentence and remand this case to the district court.

IV

There is, in our view, another reason for vacating Williams' sentence which is independent of the reason set forth in part III. This case also presents the question of whether a

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4 The court asked: "Do you *unanimously find* that one or more of the following mitigating circumstances existed at the time of the murder?"

state's failure to raise ***Teague*** in the court below waives it as a defense. Our reading of the Court's statements on the role of ***Teague***, our consideration of the holdings of our sister circuits, and our recent decision in ***Maynard v. Dixon***, 943 F.2d 407 (4th Cir. 1991), lead us to conclude that **Teague**'s retroactivity analysis is not jurisdictional in nature and is an affirmative defense that must be asserted below or else be waived.

The State, seizing on language from ***Penry***, contends that this court must determine "as a threshold matter," 492 U.S. 313, whether Williams' claim for application of ***Mills/McKoy*** is barred by the prohibition against retroactive application of "new rules." In ***Teague*** the Court did state that a habeas court must consider the retroactivity component, i.e., Is a "new rule" being invoked?, before assessing whether the facts of a case meet the rule. However, subsequent cases have shown that this is a matter of logic and not of jurisprudence. Which is to say that if the question is properly presented to a court, then a court should consider first whether a rule can be applied retroactively before deciding whether the case under review meets the rule. That this formulation was not of jurisprudential consequence was made clear by Chief Justice Rehnquist in ***Collins v. Youngblood***: "Although the ***Teague*** rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue *sua sponte*." ___ U.S. ___, 110 S.Ct. 2715, 2718 (1990) (emphasis in original).

In this case, the chronology of the chain of events is very important. The ***Mills*** decision was handed down on June 6, 1988.

Mills, 486 U.S. 367. Thereafter the district court entered its order denying Williams' habeas relief on September 13, 1988.[5] (JA Vol I, Tab E.) ***Teague*** was decided five months later on February 22, 1989. ***Teague***, 489 U.S. 288. The first oral argument before this court on appeal was heard on November 2, 1989. The ***McKoy*** decision was decided four months later on March 12, 1990. Despite the fact that Williams raised the ***Mills*** issue before the district court, the State admittedly did not raise the retroactivity issue until after the ***McKoy*** decision was rendered.[6] At that time and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time. Because of the State's failure to raise the issue until after the district court's decision and this court's first hearing on this appeal, we are confronted with the question of whether the State's failure amounts to a waiver of the issue.

In ***Hanrahan v. Green***, the Seventh Circuit held that the court need not go into the "new rule" analysis because the State did not preserve an objection to the "retroactive application" of the rule at issue. 896 F.2d at 245. Judge Easterbrook noted that the Court had raised the retroactivity question on its own in ***Teague***, but observed that the Court had the practice of applying

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5 In that order, the district court addressed the merits of the ***Mills*** claim raised by Dixon and held that the jury instructions did not violate the ***Mills*** rule (JA Vol I, Tab E, at 30-36.)

6 In its supplemental brief, the State explained: "The State's assertion of non-retroactivity in this case, while admittedly not made in the District Court, is based upon and dictated by the 'novel threshold test for federal review of state criminal convictions' announced in ***Teague***." (Supplemental Brief for Appellee at 36).

a novel constitutional rule to the case establishing the rule. More powerfully, he concluded that the State "had missed the boat" by failing to raise the retroactivity issue. ***Id.***

The Seventh Circuit was not swayed by the State's argument that ***Teague*** had not yet been decided at the time the parties were arguing about the impact of the rule set out in ***Cruz v. NewYork***, 481 U.S. 186 (1987):

> [T]he state did not preserve an objection to the retroactive application of ***Cruz***. After ***Cruz*** came down, the district judge called for briefs on its effects. The state tackled the merits without suggesting that ***Cruz*** should not be applied to [the defendant's] case.. Although it filed this response before the Court decided ***Teague***, that is neither explanation nor excuse.
>
> Disputes about the retroactive application of constitutional decisions have pervaded criminal procedure over the last 25 years. ***Teague*** adopted the position Justice Harlan expoused in ***Mackey v. United States***, 401 U.S. 667, 675, 91 S.Ct. 1160, 1164, 28 L.Ed.2d 404 (1971) (dissenting opinion), which in recent years had gathered the support of a majority of the Justices - though never before Teague in the same case on a collateral attack. (***Griffith v. Kentucky***, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), adopted Justice Harlan's position for cases on direct appeal.) Prosecutors had been pumping for Justice Harlan's position for years. Not phrasing an objection to retroactivity in the precise terms the Court adopted in ***Teague*** is one thing; not phrasing any objection to retroactivity is another.

Hanrahan, 896 F.2d at 245 (emphasis in original). The Seventh Circuit held that the State's failure to raise the retroactivity issue constituted a waiver of the issue. ***Id***.

Other circuits have gone the other way. In ***Hopkinson v. Shillinger***, 888 F.2d 1286 (10th Cir. 1989) (en banc), the Tenth Circuit held that "the non-retroactivity defense is not waived, and should be considered." ***Id***. at 1288. In reaching this conclusion the court noted that "the non-retroactivity defense...was not previously available to the state" because ***Teague*** was decided after the district court entered judgment. For that reason, and because the court saw the scope of the writ of habeas corpus as implicated, the court held that it must raise "the non-retroactivity defense'" *sua sponte*. ***Id***. Similarly, in ***Smith v. Black***, 904 F.2d 950, 981 n. 12 (5th Cir. 1990), a panel for the Fifth Circuit found that though the circuits have split, "the better choice is to reach the ***Teague*** issue" whenever it is raised by the State.

The crux of the cases holding that retroactivity analysis cannot be waived is that courts must be able to take up the issue *sua sponte* because, after all, that is what the Supreme Court itself did in ***Teague***, *See* ***id***.; ***Hopkinson***, 888 F.2d at 1288. We are unpersuaded by this reasoning. As Judge Easterbrook points out in ***Hanranhan***, "there had been a practice of applying a novel constitutional rule to the case establishing the rule and asking the retroactivity question later. ***Teague*** changed that practice....[Thus,] it is understandable that the state did not object to the application of the rule to Teague himself, although the state had objected to the retroactive application to ***Teague*** *of* ***Batson v. Kentucky***, 476 U.S. 79 (1986)." 896 F.2d at 245. Moreover, since ***Teague*** does not represent a change in practice by the Court, it cannot seriously be contended that the Court's reaching the question in ***Teague*** means that all courts must reach the same question-that view denies the role the Court plays in our system.

And this view of retroactivity analysis is confirmed by the Court's holding in ***Collins v. Youngblood***, in which it declared that the ***Teague*** rule "is not 'jurisdictional.'"

Since the ***Teague*** rule is not jurisdictional, in the sense that a court must address it *sua sponte* if not raised, *see* ***Collins***, 110 S.Ct. at 2718, then we confront the question whether a state's failure to raise it below amounts to waiver.

We begin with the general rule that claims not adjudicated below, and in particular defenses that have not been raised in a pleading, by motion, or at trial, normally will be considered waived and cannot be heard for the first time on appeal. ***National Treasury Employees Union v. Internal Revenue Serv.***, 765 F.2d 1174, 1176 n. 1 (D.C. Cir. 1985). In the habeas context, where we proceed on collateral review, the notion of waiver applies, though it typically takes the form of the procedural default rule. Under that rule, when "the claim has not been presented to the state court...it is now barred" unless the petitioner can show cause for the default and actual prejudice. ***Bassette v. Thompson***, 915 F.2d 932, 937 (4th Cir. 1990). We follow that rule vigorously, Justice O'Connor explained in ***Teague***, and "have declined to make the application of the [rule] dependent on the magnitude of the constitutional claim at issue, or on the State's interest in the enforcement of its procedural rule." 489 U.S. at 308 (citations omitted).

The reason for our close adherence to the rule is that "the underlying considerations of finality," which Justice O'Connor saw underpinning the finality of civil judgments, "find significant and compelling parallels in the criminal context." ***Id.*** at 309. We agree. *See* ***Bassette***, 915 F.2d at 935-37. However, finality, and its companion, waiver, must run along a two-way street. Finality certainly means that a petitioner cannot raise new claims on

appeal not yet raised. It also must mean that the State cannot raise new defenses on appeal not raised below.

In ***Maynard v. Dixon***, 943 F.2d 407, 418 (4th Cir. 1991), this court reached the merits of the petitioner's ***Mills/McKoy*** claim because it assumed without deciding that the State had waived the ***Teague*** defense. We agree with the Maynard court and the Seventh Circuit that a state's failure to raise the issue of retroactivity below constitutes waiver of that defense.

In this case, Williams raised the ***Mills*** issue before the district court, and the court rejected his claims on their merits. The State did not raise the retroactivity question in this case at the district court level, although retroactivity claims have been made for the last 25 years. *See* ***Hanrahan***, 896 F.2d at 245. Even after ***Teague*** was decided, the State did not raise the retroactivity issue in its first arguments before this court. It was not until the decision was handed down in ***McKoy*** that the State decided to raise the retroactivity issue. We believe that was too late. On the facts before us, the State "missed the boat," ***Hanranhan***, 896 F.2d at 245, and waived any ***Teague*** defense to the application of ***McKoy*** and ***Mills*** in this case.

V

To summarize, we do not disturb Williams' conviction as the trial court made no constitutional errors concerning the guilt phase of the trial. However, we vacate Williams' sentence of death and remand the case for resentencing because the jury instructions were unconstitutional under the rules set out in ***Mills*** and ***McKoy***. Williams may benefit from the ***Mills*** and ***McKoy*** rules because they are bedrock procedural rules falling within the second exception to the ***Teague*** rule. As an independent and alternative ground, we vacate Williams' sentence and remand for resentencing because the State waived any ***Teague*** defenses to

the retroactive application of these rules by its failure to raise the issue at the district court level or at the first hearing before this court.

In light of our holding on the ***McKoy*** issue, at this time we need not address Williams' assignments of error concerning post-trial proceedings.

AFFIRMED IN PART; VACATED AND REMANDED IN PART

WIDENER, Circuit Judge, concurring:

I concur in the result and in all of the opinion except Part IV. I would hold that the State did not waive the ***Teague*** question as a defense.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED April 17, 1992

No. 89-4001

DOUGLAS WILLIAMS, JR.
Petitioner - Appellant

v.

GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA
Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Widener and Judge Butzner.

For the Court,

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED April 23, 1992

No. 89-4001

DOUGLAS WILLIAMS, JR.
Petitioner - Appellant

v.

GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA
Respondents - Appellees

ORDER

Respondents have filed a motion to stay the mandate.

The Court grants the motion and stays issuance of the mandate pending a petition for certiorari to the U.S. Supreme Court.

Entered at the direction of Chief Judge Ervin, with the concurrences of Judge Widener and Judge Butzner.

For the Court,

S/Bert M. Montague
ACTING CLERK

JUDGE FOUNTAIN'S CHARGE TO THE JURY ON THE SENTENCING PHASE OF THE CASE

Ladies and gentlemen, I will in a few moments submit to you for your determination certain issues which bear upon the question of what punishment should be imposed upon the defendant Douglas Williams, Jr. upon his conviction of murder in the first degree.

The relevant portions of the statute, that is, the legislative act under which this proceeding is conducted, provides among other things that in the proceeding, that is, in the sentencing hearing there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case but all such evidence is competent, that is, all such evidence as you have already heard in the guilt phase of the case is competent for your consideration in passing upon punishment.

Also the statute provides that evidence may be presented as to any matter that the Court deems relevant to sentence and may include matters relating to any of the aggravating or mitigating circumstances.

Further, the statute provides that after hearing the evidence, arguments of counsel, and instructions of the Court, the jury shall deliberate and render a sentence recommendation to the Court, based upon the following matters:

Number one: Whether any sufficient aggravating circumstance exists.

Number two: Whether any sufficient mitigating circumstance exists.

Then, based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the state's prison for life.

The sentence recommendation must be agreed upon by unanimous vote of the twelve jurors. I will submit to you certain issues relating to aggravating circumstances and relating to mitigating circumstances. It is for you to say whether any of them exist and, if so, which ones.

I will first read the issues to you and explain them in the order that they are listed.

Number one. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary?

(B) Was the murder committed while the defendant was engaged in a sex act?

(C) Was the murder committed for pecuniary gain?

(D) Was the murder especially heinous, atrocious or cruel?

The second issue: Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity?

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

(C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

(D) The age of the defendant at the time of the murder?

(E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

The third question: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

And four: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Then there is a place and a date for the signature of foreman of the jury.

Below that reads as follows: We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr. be - and there is a blank space. Depending upon how you find, the foreman would write in that space either "death" or "life in prison."

Members of the jury, I referred a few moments ago to aggravating circumstances.

"Aggravate" means to make something worse. A mitigating circumstance is a circumstance which moderates or causes the matter under inquiry to become milder.

Now, as to the first issue, if you find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of first degree burglary. I am aware that you have determined by your verdict at the first phase of the trial that the defendant committed murder in the commission of first degree burglary and in the commission of a sex act. However, as to this aspect of the case, it is necessary that I resubmit that to you.

Unless requested to do so, I will not go into as much detail as I did at the first phase of the trial when I charged you this morning on the question of guilt or issue or that question, innocence. However, as to that issue or that question, as I said, first degree burglary is the breaking and entering the dwelling of another, which is occupied, and in the nighttime, with the intent to commit a felony therein. And the question for determination here is whether the defendant broke and entered the home of Mrs. Dawson while it was occupied by her, in the nighttime, with the intent to commit larceny therein.

I also said that larceny is the felonious taking and stealing and carrying away personal property of another with the intent on the part of the taker to convert the property to his own use and to permanently deprive the true owner of its use. It is not necessary that larceny should have been committed but it is necessary to constitute first degree burglary that there must have been such an intent at the time of the commission of first degree burglary, if you find that it was committed.

The burden of proof as to that is upon the state to satisfy you beyond a reasonable doubt from the evidence that that aggravating circumstance exists.

Of course, as I have said earlier, the defendant contends he had no such intent. That he went there to go to sleep. That he had no intent to commit any crime of any kind, and that he contends you should answer that, "No."

The state contends that you should answer it, "Yes."

If the state has satisfied you from the evidence and beyond a reasonable doubt the existence of that circumstance you would answer it, "Yes." If you have a reasonable doubt as to that you would answer it, "No."

The second question under the first issue, designated "B" - Was the murder committed while the defendant was engaged in a sex act?

A sex act or sexual act does not have reference to vaginal intercourse or sexual intercourse. It means the penetration, however slight, by any object into the genital or anal opening of another person's body and where that is done to another person by force and against the will of such other person, then it becomes a sexual act.

Therefore, if the defendant caused a mop handle to be inserted into the vaginal tract of Mrs. Dawson while in the commission of murder, that would be the commission while engaged in a sex act.

Now, let me say, members of the jury, to say that a murder is committed while engaged in burglary or while engaged in a sex act does not mean that - well, with reference to the sex act, it does not mean that she must have died the instant that a mop handle

was inserted in her, if you find that it was. It would be sufficient if it was part of the transaction or the enterprise in which the defendant was engaged and if in the process of causing her death he did cause a mop handle to be penetrated in the manner referred to, then that would constitute a murder while engaged in a sexual act even though she may not have died at that precise moment.

The burden of proof as to that issue is upon the state to satisfy you from the evidence and beyond a reasonable doubt that the defendant did commit murder of Mrs. Dawson while engaged in a sexual act. I believe the copies of the issues I handed you refers to "sex act." It should be "sexual." When I have said "sex act" I am referring to "sexual act," which is the language used in the statute.

Number (C) Was the murder committed for pecuniary gain?

That simply means did he kill Mrs. Dawson for the purpose of getting something of value from her or from her home that he did not own or have any right or claim to. Or, to put it another way, did he kill her for the purpose of stealing or committing larceny, as I have defined that to mean.

Of course, that is a question of intent, as to what his intent was, if any, and it is for you to say.

He contends if he wanted to have any pecuniary gain he could have done more than maybe getting a set of keys or possibly some blank checks. He contends there were many things of value in that house and if he wanted to steal something of value he had every opportunity to do so and that blank checks and keys had no real market value. So, he contends, members of the jury, you should answer that issue, "No," and the state contends that he did go there for the purpose of stealing. That he had that intent and that the murder was committed for pecuniary gain. However, that

is for you to determine. If the state has satisfied you from the evidence and beyond a reasonable doubt that the murder was committed for pecuniary gain, you will answer that, "Yes." If you have a reasonable doubt as to that, you will answer it, "No."

Now, number (D) - Was the murder especially heinous, atrocious or cruel?

Our Court has said that every murder is not especially heinous, atrocious or cruel. That does not apply to every homicide. By using the word "especially," the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury could answer that issue in favor of the state.

Further, I instruct you that the words, "especially heinous, atrocious or cruel," means extremely or especially or particularly heinous or atrocious or cruel. You are instructed that "heinous" means extremely wicked or shockingly evil. "Atrocious" means marked by or given to extreme wickedness, brutality or cruelty; marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utterly indifferent to or enjoyment of the suffering of others.

So, it is for you to determine, members of the jury, whether the murder of Mrs. Dawson meets that test or whether it does not.

The state contends that she suffered a slow and agonizing and brutal death. That her death was especially heinous and cruel and atrocious.

The defendant, on the other hand, contends that she must have been unconscious in a very short while and even if she lingered she was not suffering pain, or that if she did it would have been for a very short while, and that you should answer that, "No."

However, that is for you to determine and as to that, if the state has satisfied you from the evidence and beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel, you would answer that, "Yes." If you have a reasonable doubt as to that, you would answer it, "No."

After considering issue number one and the subsections (A), (B), (C) and (D), you will consider issue number two which reads: "Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?"

Now, members of the jury, the burden as to that issue and the subsections is upon the defendant, but he does not have the burden of satisfying you beyond a reasonable doubt as to the existence of any mitigating circumstance. He has the duty merely to satisfy you from the evidence in the case, and "(A)" under that section reads: "Does the defendant have a significant history of prior criminal activity?" Of course, if he does not that is a mitigating circumstance.

The defendant contends that his criminal record has been offered and that it consists of simple offenses, offenses of little consequence. He contends that even though there has been offered in evidence certified copies of a record of seven - eight - nine convictions that many of them were he contends when he was much younger. That they were principally simple assaults. That in most instances he was released from jail when he was convicted because he had been in jail a week or two, and that in many of them he was fined only a small fine or court costs or given probation; and that only once has he served an active prison sentence. So, he contends, members of the jury, that there is nothing significant about that.

The word, "significant," as used in this issue means important, momentous; and the question is whether the defendant

has a significant history of criminal activity or whether he does not.

If he has satisfied you, merely satisfied you, that he does not have a significant history of prior criminal activity, then you will answer that, "No," that is to say that he does not. If he has failed to so satisfy you and if you believe that the record which has been offered as to his prior criminal record is a significant history of prior criminal activity, you would answer it, "Yes."

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

As to that, members of the jury, the burden is upon the defendant to merely satisfy you that he was under the influence of mental or emotional disturbance at the time of the murder?

As to that he contends that it was determined by a state psychiatrist in September of this year that the defendant suffers mild mental retardation, with an I.Q. of 63. That he reads at the grade level of 3.9. He contends that was intoxicated. That his mind was disturbed.

Mental disturbance, of course, has reference to the thinking process and the use of the mind.

The emotional disturbance, if there be one, refers to a person's nerves, to his emotions, and the question here is whether the defendant because of his possible brain disease, his low I.Q., his inability to learn very much, his intoxication which he contends he was experiencing that night; as to whether all of those and he contends all of those combined to influence and did influence the mental and emotional disturbance and cause mental and emotional disturbance at the time of the murder.

The state contends that the defendant was not as drunk - or wasn't drunk and if intoxicated was aware of his surroundings, was aware of what was going on. That he was not emotionally disturbed nor mentally disturbed. That even if he had had pills and intoxicating liquor the state contends that he knew what he was doing and that he did whatever he did do deliberately and not as a result of any emotional or mental disturbance.

However, that is for you to determine and if the defendant has satisfied you, that is, merely satisfied you, that he was under the influence of mental or emotional disturbance at the time of the murder, then you would answer that, "Yes." If he has failed to satisfy you as to that, you would answer it, "No."

One further thing let me say in regard to that particular issue or section of the issue, to say that one is disturbed emotionally means agitation of the passions or sensibilities; strong feelings arising subjectively rather than through conscious mental effort.

So, members of the jury, it is for you to answer that, depending upon how you find from all the evidence in the case.

Number (C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

Let me say to you as to that issue, members of the jury, for a person to be excused for the commission of a crime on the grounds of insanity the person must have suffered such defect of mind or disease of mind as not to know the nature and quality of his act; or if he did know it not to know that it was wrong. To use the language of our Supreme Court, "An accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime and at the time of so doing is laboring under such a defect of reason

from disease of the mind as to be incapable of knowing the nature and quality of the act he is doing or if he does know this incapable of distinguishing between right and wrong in relation to such act."

Now, I explain that to say to you that the issue that we are now discussing does not contemplate and it is not claimed that the defendant was suffering from such a defect of reason as to be able to understand the nature and the quality of his act or to know that he was doing wrong. That is not the question. The question is whether his capacity to appreciate the criminality of his conduct was impaired or his ability to conform his conduct to the requirements of the law was impaired. While the defendant might have known that his conduct was wrong he might not have been able to appreciate, that is, to fully comprehend or be fully sensible of its wrongfulness.

Further, while his capacity to so appreciate the wrongfulness of his conduct might not have been impaired - might not have been totally obliterated, it might have been impaired. That means lessened or diminished and even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, you could find depending upon how you determine from the evidence and you should consider whether the existence of this mitigating factor existed, and it would if you believe that the defendant's capacity to conform his conduct to the law, that is, his capacity to refrain from illegal conduct, was impaired.

This does not mean that the defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

Now, he contends that he has a mental defect. That he is slightly retarded or mildly retarded is the word used by the psychiatrist. He contends that his capacity to conform his conduct to the requirements of the law was impaired; that it was lessened;

that it was diminished and his ability to appreciate the criminality of his conduct was lessened and diminished, that is, impaired. The state contends that even if he had any defect of reason that his capacity to appreciate the criminality of his conduct was not impaired. The state contends that he knew everything that he did and that his inability [sic] to conform his conduct to the requirements of the law, the state contends, was not impaired.

The defendant, however, contends that he had been drinking heavily and if not drunk was intoxicated and that with the pills he had been taking and the intoxicating liquors he had been drinking all combined to diminish and impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

If he has satisfied you, members of the jury, from the evidence in the case that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, then you would answer that issue, "Yes." Otherwise, you would answer it, "No."

On the next page you will find the next subsection or portion of this issue entitled "(D)" The Age of the defendant at the time of the murder? That is listed in the statute under what may be mitigating circumstances is the age of the defendant.

The only evidence I recall about his age is that he was 23 - or is 23 years of age. Whether that is a mitigating factor or whether it isn't is for you to determine.

He contends that he is still a very young man and that is a circumstance that mitigates whatever his conduct may have been.

The state contends that he is old enough to know, that he did know, that he is not an adolescent child, that he is not a

teenager but that he is 23 years of age, and the state contends that is not a mitigating circumstance.

However, if the defendant has satisfied you from the evidence in the case that his age is a mitigating circumstance, you would answer that "Yes." Otherwise, you you would answer it, "No."

Number (E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

He contends, members of the jury, that you should sift through the evidence. That you should consider all of the reasons that would justify your answering that, "Yes." It is for you to determine from all the evidence in the case whether there is any mitigating circumstance that has not been referred to already and which arises from the evidence. In considering that you should consider all of the things that we have discussed concerning mitigation, that is, his age; the condition he was in that night, whatever you find it to have been; his mental problems, if you find that he has one; his intoxication; his addiction to alcohol; all the circumstances that you deem to be of mitigating value or any of the circumstances you deem to be of mitigating value; and if you find from the evidence any circumstance which you deem to have mitigating value, you would answer that, "Yes." Otherwise, you would answer it, "No."

Then, members of the jury, you should go to the third issue which reads: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

As to that issue, members of the jury, if you have found at least one aggravating circumstance to exist, one or more, you would go to issue number three which reads, "Do you unanimously find from the evidence and beyond a reasonable doubt

that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?"

Now, when you come to consider that question, it is not who has the most favorable answers to the issues and to the questions. It is not a question of numerical weight. The question is the weight of the testimony and the weight of the circumstances you find to exist as to whether those which are aggravating outweigh in your minds the mitigating circumstances. And if you find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh, that is, in value and in importance the mitigating circumstances, you would answer that, "Yes." Otherwise, you would answer it, "No."

If you answer the third issue "No," you would not consider the fourth issue, and under those circumstances you would stop there and recommend life in prison, but if you answer that issue "Yes," you will go to the fourth issue which reads: "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?"

That is simply a matter for you to determine, members of the jury, based upon your findings concerning the aggravating and mitigating circumstances and if you have answered the third issue "Yes," and if you find beyond a reasonable doubt that the aggravating circumstances which you have found are sufficiently substantial to call for the imposition of the death penalty, you would answer that, "Yes."

If you answer that "Yes," it would be the duty of the jury to recommend death. If you answer that "No," it would be the duty of the jury to recommend life in prison.

You all step up here, please.

(UNRECORDED BENCH CONFERENCE.)

Sheriff, will you pick up those copies of the issues.

(THE SHERIFF DOES SO.)

All right, members of the jury, the twelve of you may retire. The alternates, if you will, wait for us, under the same instructions, in the courtroom, if you like. You might prefer to go out in the audience area to be seated but stay with us, please.

Ladies and gentlemen, when you have completed your findings, let the sheriff know and we will ask you to come in and give us your verdict in this phase of the case.

(THE JURY RETIRED AT APPROXIMATELY 4:25 P. M.)

Let the record show, please, that before the jury retired to make its determination as to punishment the Court and defendant's counsel and the district attorney had a charge conference in the absence of the jury, at which time defendant's counsel requested the Court to instruct the jury if they did not agree on a verdict in a reasonable time they would be discharged and a life sentence imposed. The Court declines to so instruct the jury and the defendant EXCEPTS.

We will just be at ease, ladies and gentlemen.

(AT APPROXIMATELY 5:50 P.M. THE JURY RETURNED TO THE COURTROOM.)

THE COURT: I understand from the sheriff there is some question the jury wishes to ask me, is that correct?

FOREMAN: Yes, sir.

THE COURT: All right.

FOREMAN: We seem to find some ambiguity in the wording of Item Two, the first question in Item Two, and then 2. (B). The question of where the unanimous part comes in . . .

THE COURT: Well . . .

FOREMAN: It seems to be a reversal.

THE COURT: No, no. Question Number Two is asking about mitigating circumstances. If you find either mitigating circumstance to exist - you can't make such a finding unless it is a unanimous finding and, of course, you couldn't make a finding that any aggravating circumstance exists unless it is unanimous. That means unless all of you agree.

FOREMAN: Yes, sir, but the way some of the questions (A) (B), and (C), are listed there in some cases a "Yes" would be a mitigating circumstance . . .

THE COURT: That's right . . .

FOREMAN: And in some cases a "No" would be a mitigating circumstance . . .

THE COURT: That is right.

FOREMAN: And that is what has got us confused. THE COURT: I'm not doing that to confuse you, I am just using the language of the statute. Do you want me to talk to you about Number Two and (A) and (B), are they the ones?

FOREMAN: (B) is the one we are having a problem with.

THE COURT: Well, that question is this: Do you unanimously find . . . Did you say (B)?

FOREMAN: Yes, sir.

THE COURT: . . . that the defendant was under the influence of mental or emotional disturbance at the time of the murder?

That is to say, if he was under the influence of mental or emotional disturbance at the time of the murder, you should answer that, "Yes." If he was not or if you do not find that he was under the influence of mental or emotional disturbance at the time of the murder, you would answer it, "No."

FOREMAN: When you say "find," you mean unanimously find?

THE COURT: Yes, sir. Yes, sir.

FOREMAN: Thank you, sir.

THE COURT: And I point out that Number Two simply asks if you find the existence of one or more of the following mitigating circumstances. As I said, that doesn't require a finding beyond a reasonable doubt but it merely means do you find from the evidence in the case, or are you satisfied from the evidence in the case - that one or more exists and those that you are so satisfied you should answer them that they do exist. Otherwise, you would not.

Is (B) the only one that you . . .

FOREMAN: That seems to be.

THE COURT: All right. Does that answer your question?

FOREMAN: It does me.

THE COURT: All right. Apparently there is no other question. You may retire.

FOREMAN: Thank you.

THE COURT: While you are in here, may I make an inquiry of you?

It is almost 6:00 o'clock. You have been out, I believe, about an hour and a half at this stage of the proceeding. I don't want to try to punish the jury or try to force a verdict or anything of that kind. If you are making progress and want to stay out a while longer, it will be fine. If you don't agree, and I am certainly not trying to rush you but if you don't agree in a short while I will be glad to let you go home and come back in the morning, because I know it can be awful tiring staying up here all day, especially when you aren't used to it.

FOREMAN: I would say let us go a while longer.

THE COURT: All right.

(THE JURY RETIRES FROM THE COURTROOM AT APPROXIMATELY 5:56 P. M.)

(THE COURT SENT FOR THE JURY AT APPROXIMATELY 6:35 P. M.)

THE COURT: The sheriff reports that the jury said if you will give them about two more minutes they will be through.

(THE JURY RETURNED TO THE COURTROOM IN A FEW MINUTES.)

THE COURT: Will you stand, please.

(THE JURY STANDS.)

THE COURT: You have agreed on the issues and verdict concerning the question of punishment, is that correct?

FOREMAN: That's right.

THE COURT: You have found for your verdict - you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary? You answer that "Yes?" Is that correct?

FOREMAN: Yes.

THE COURT: (B) Was the murder committed while the defendant was engaged in a sex act? You answer that "Yes?" Is that correct?

FOREMAN: Yes.

THE COURT: (C) Was the murder committed for pecuniary gain? You answer that "Yes?" Is that correct?

FOREMAN: Yes, sir.

THE COURT: (D) Was the murder especially heinous, atrocious or cruel? You answer that "Yes?" Is that correct?

FOREMAN: Yes, sir.

THE COURT: Do each of you agree to that?

JURY: YES.

THE COURT: Number Two. Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity? You answer that "Yes?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: (C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (D) The age of the defendant at the time of the murder? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: Number Three. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances? You answer that "Yes?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: Number Four. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty? You answer that "Yes?"

FOREMAN: Yes, sir.

THE COURT: So say you all?

JURY: YES, SIR.

THE COURT: And that is signed, dated today and signed by Mr. Marks as foreman.

I read further: "We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr., be death."

Is that the verdict of each of the jurors?

JURY: YES.

THE COURT: All right, have seats, please. Members of the jury, it will be necessary that I ask each of you individually

concerning your verdict on the question of punishment and, of course, answer, please, as I call your name.

DEBORAH LEWIS PENDER.

MRS. PENDER: Yes.

THE COURT: Mrs. Pender, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MRS. PENDER: Yes, Your Honor.

THE COURT: Is that your finding?

MRS. PENDER: Yes.

THE COURT: And do you still assent thereto? Do you still agree to that?

MRS. PENDER: Yes, Your Honor.

THE COURT: MARY B. CARNEY.

MRS. CARNEY: Yes, Your Honor.

THE COURT: Mrs. Carney, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MRS. CARNEY: Yes.

THE COURT: Is that your finding?

MRS. CARNEY: That's right.

THE COURT: Do you still assent thereto?

MRS. CARNEY: Yes, Your Honor.

THE COURT: ALTON T. STRICKLAND.

MR. STRICKLAND: Yes, sir.

THE COURT: Mr. Strickland, do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. STRICKLAND: Yes, sir.

THE COURT: Do you still assent thereto?

MR. STRICKLAND: Yes.

THE COURT: Let me go back, first as to Mrs. PENDER, based upon your finding, do you recommend that the punishment of the defendant Douglas Williams, Jr. be death?

MRS. PENDER: Yes, Your Honor.

THE COURT: Do you still assent thereto?

MRS. PENDER: Yes, Your Honor.

THE COURT: MRS. CARNEY, I failed to ask you, I think - do you based upon what you have just said recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MRS. CARNEY: Yes, Your Honor.

THE COURT: Do you still assent to that too?

CARNEY: Yes.

THE COURT: MR. STRICKLAND, do you based upon your finding recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. STRICKLAND: Yes, Your Honor.

THE COURT: Do you still assent to that?

MR. STRICKLAND: Yes.

THE COURT: MR. PETER TAPIA.

MR. TAPIA: Yes.

THE COURT: Mr. Tapia, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. TAPIA: Yes.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death? MR. TAPIA: Yes.

THE COURT: Do you still assent thereto?

MR. TAPIA: Yes.

THE COURT: MR. JAMES MACK.

MR. MACK: Yes, sir.

THE COURT: Mr. Mack, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. MACK: Yes, sir.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. MACK: Yes.

THE COURT: Is that your verdict?

MR. MACK: Yes, sir.

THE COURT: Do you still assent thereto?

MR. MACK: Yes.

THE COURT: Mr. Marks, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. MARKS: Yes, sir.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. MARKS: Yes.

THE COURT: Do you still assent thereto?

MR. MARKS: Yes.

THE COURT: MR. JAMES JOYNER.

MR. JOYNER: Yes.

THE COURT: Mr. Joyner, you have found from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. JOYNER: Yes.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. JOYNER: Yes, sir.

THE COURT: Do you still assent thereto?

MR. JOYNER: Yes, sir.

THE COURT: MR. WILLIAM J. LYNCH.

MR. LYNCH: Yes.

THE COURT: Mr. Lynch, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. LYNCH: Yes, Your Honor.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. LYNCH: Yes, Your Honor.

THE COURT: And do you still assent thereto?

MR. LYNCH: Yes, I do.

THE COURT: MR. JAMES NORRIS. MR. NORRIS: Yes, sir.

THE COURT: Mr. Norris, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. NORRIS: Yes.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. NORRIS: Yes.

THE COURT: Do you still assent thereto?

MR. NORRIS: Yes.

THE COURT: MR. CHARLIE W. LEWIS.

MR. LEWIS: Yes, sir.

THE COURT: Mr. Lewis, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances

found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. LEWIS: Yes, sir.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. LEWIS: Yes, sir.

THE COURT: Do you still assent thereto?

MR. LEWIS: Yes.

THE COURT: MR. ERNEST PROCTOR.

MR. PROCTOR: Yes.

THE COURT: Mr. Proctor, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. PROCTOR: Yes.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. PROCTOR: Yes.

THE COURT: MR. PERRY WADSWORTH.

MR. WADSWORTH: Yes, sir.

THE COURT: Mr. Wadsworth, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. WADSWORTH: Yes, Your Honor.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. WADSWORTH: Yes, Your Honor.

THE COURT: And do you still assent thereto?

MR. WADSWORTH: Yes.

THE COURT: Do each of the jurors assent to the finding and the recommendation that has been announced?

JURY: YES, WE DO.

THE COURT: DOUGLAS, STAND UP.

MR. BRIDGERS: I would like to make a motion.

THE COURT: You can put the motions you want in the record.

DOUGLAS, is there anything you want to say as to why judgment of death should not be pronounced against you?

DOUGLAS WILLIAMS, JR.: NO.

THE COURT: The defendant, Douglas Williams, Jr. was duly indicted by the Grand Jury of Edgecombe County on a bill

of indictment charging murder in the first degree of Adah H. Dawson.

The defendant was thereafter arraigned and entered a plea of not guilty. The defendant was brought to trial on November 16, 1981 upon the charge set out in the aforesaid bill of indictment. A jury was duly impanelled and, after hearing all the evidence, arguments of counsel and charge of the Court, returned with their verdict and found the defendant guilty of murder in the first degree.

Thereafter on November 20, 1981, before the same jury, evidence was offered concerning punishment. Thereafter, counsel for the state and counsel for the defendant argued to the jury and the jury was charged upon the issues concerning aggravating and mitigating circumstances and further found from the evidence and beyond a reasonable doubt that the aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty.

WHEREUPON, the jury unanimously recommended to the Court that the punishment for Douglas Williams, Jr. be death.

It is, therefore, CONSIDERED, ORDERED AND ADJUDGED that the defendant be transported to the State Prison in Raleigh by the Sheriff of Edgecombe County and that he shall remain in the custody of the Warden of State Prison until Friday, March 26, 1982, and that on said day between the hours of ten o'clock in the morning and three o'clock in the afternoon the defendant shall be taken by said Warden or his duly authorized Deputy to the place provided for execution in said penitentiary.

It is further ADJUDGED that the Warden or his duly authorized Deputy shall then and there take the defendant into the death chamber where the defendant shall be caused to suffer death

by inhaling lethal gas, and lethal gas shall be continued to be administered of sufficient quantity to cause death.

AND MAY GOD HAVE MERCY ON YOUR SOUL.

(THE JURORS WERE DISMISSED WITH THE THANKS OF THE COURT.)

THE COURT: (To Mr. Bridgers) Do you want to put your motions in the record? Let the record show they were made upon the coming in of the verdict.

MR. BRIDGERS: THE DEFENDANT MOVES TO SET THE VERDICT ASIDE AS BEING AGAINST THE GREATER WEIGHT OF THE EVIDENCE.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT MOVES FOR A NEW TRIAL FOR ERRORS COMMITTED DURING THE COURSE OF THE TRIAL ASSIGNED AND TO BE ASSIGNED.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT MOVES FOR APPROPRIATE RELIEF.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT GIVES NOTICE OF APPEAL.

THE COURT: Upon the coming in of the verdict of guilty and the judgment of death the defendant in open Court through counsel OBJECTS and EXCEPTS and gives notice of appeal to

the Supreme Court. Further notice is waived. The defendant will be allowed 90 days in which to state and serve record on appeal and the state will be allowed 30 days thereafter to serve counter-record or exceptions. No appearance bond is allowed.

Supreme Court, U.S.
FILED
OCT 20 1992
OFFICE OF THE CLERK

NO. 92-111

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,

Petitioners,

v.

DOUGLAS WILLIAMS, Jr.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Inasmuch as the judgment below was expressly and independently bottomed upon a ground not mentioned, much less complained about, in the petition for writ of certiorari -- namely, the State's failure to raise an issue in the Court of Appeals in its brief or at oral argument as required by the Federal Rules of Appellate Procedure -- should this Court even entertain the questions presented in the Petition?

II. When none of the opinions relied upon by a petitioner mention a question -- i.e., whether non-retroactivity of criminal procedure rules is an affirmative defense which must be pled by the state in the district court in habeas corpus actions -- can those opinions possibly show a conflict in the circuits with regard to that question? (The State's question II.)

III. Do the rules requiring that issues should be raised by the parties in the manner provided in the Rules of Appellate Procedure, and that absent jurisdictional concerns issues not so raised may be waived, present important questions of federal law which have not been but should be addressed by this Court, especially when the petitioner has not complained about the application of these rules in this case?

IV. If it was an abuse of discretion for the Court of Appeals not to address a procedural issue (non-retroactivity), known about but withheld by the state on appeal until after the state lost the substantive issue in McKoy v. North Carolina, 494 U.S. 433 (1990), then should this Court address whether Lockett

v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), require relief for Douglas Williams because neither Mills v. Maryland, 486 U.S. 367 (1988), nor McKoy v. North Carolina, 494 U.S. 433 (1990), are new law, when the lower court did not address that issue and that issue is not presented (but is presumed) in the Petition?

V. Should this Court address whether a rule of criminal procedure would fall within an exception to non-retroactivity under Teague v. Lane, 489 U.S. 288 (1989), when the petition for writ of certiorari does not present the question of whether the rule is a new rule?

VI. Whether Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), the law at the time Douglas Williams' sentence became final, require that sentencers not be prohibited from considering relevant mitigating circumstances at capital sentencing?

VII. Whether this Court's striking of a requirement that sentencers unanimously find something to be mitigating before any single juror could consider that circumstance as mitigating constitutes application of bedrock procedural elements implicit in ordered liberty which assure accuracy in decision-making? (The State's Question I).

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NO. 92-111

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OCTOBER TERM 1992

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Petitioners

v.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Comes the Respondent, Douglas Williams, Jr., and pursuant to a request from the Court submits his Brief in Opposition to the petition for writ of certiorari filed by Gary T. Nixon, Warden, Central Prison, Raleigh, North Carolina, and Lacy H. Thornburg, Attorney General of the State of North Carolina.

STATEMENT OF THE CASE

Respondent agrees with much of what is contained in the statement of the case presented by the State at pages 3 - 7 of the petition. However, in order for the Court to understand what Douglas Williams' sentencers were precluded from considering, and how they were precluded, the following additional statement of the case is submitted.[1]

A. There Was Mitigating Evidence for Sentencer Consideration.

The trial judge instructed the jurors regarding five (5) mitigating circumstances. During the charge to the jury, the judge summarized for the jurors the contentions of the parties regarding what the evidence showed. The judge's summary illustrates the "facts" to which the defendant's jury was required to apply the law, and presents some of the mitigation which could have affected "at least one juror's vote and thus the jury's sentencing recommendation." State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

For example, after instructing the jury regarding the statutory mitigating circumstance of whether the defendant was under the influence of mental or emotional disturbance at the time of the offense, the trial judge summarized:

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[1]The State's statement of the circumstances of the offense is not complete. A more complete description is contained in the lower court's opinion at A 6 - 7. Respondent also contends, and argued below, that relevant circumstances of the offense include the State's proof at sentencing that Douglas Williams has an IQ of 63 and the abundant evidence that Douglas Williams was highly intoxicated from alcohol and drugs on the night of the offense.

> As to that he contends that it was determined by a state psychiatrist in September of this year that the defendant suffers mild mental retardation, with an I.Q. of 63. That he reads at the grade level of 3.9. He contends that he was intoxicated. That his mind was disturbed.
>
> Mental disturbance, of course, has reference to the thinking process and the use of the mind.
>
> The emotional disturbance, if there be one, refers to a person's nerves, to his emotions, and the question here is whether the defendant because of his possible brain disease, his low I.Q., his inability to learn very much, his intoxication which he contends he was experiencing that night; as to whether all of those and he contends all of those combined to influence and did influence the mental and emotional disturbance and cause mental and emotional disturbance at the time of the murder.

R. 403. Similarly, with regard to the statutory mitigating circumstance of whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, the trial judge summarized:

> Now, he contends that he has a mental defect. That he is slightly retarded or mildly retarded is the word used by the psychiatrist. He contends that his capacity to conform his conduct to the requirements of the law was impaired; that it was lessened; that it was diminished, and his ability to appreciate the criminality of his conduct was lessened and diminished, that is, impaired.
>
> . . . .
>
> The defendant, however, contends that he had been drinking heavily and if not drunk was intoxicated and that with the pills he had been taking and the intoxicating liquors he had been drinking all combined to diminish

> and impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

R. 406-407.[2] Finally, the judge summarized several of the contentions in mitigation of punishment:

> His age; the condition he was in that night, whatever you find it to have been; his mental problems, if you find that he has one; his intoxication; his addiction to alcohol;

R. 409.

B. The Sentencers Were Expressly Required Unanimously To Find Something To Be Mitigating Before Any Single Sentencer Could Consider It To Be So.

At least three occurrences at Douglas Williams' sentencing proceeding demonstrate the sentencing error, which is not contested by the State. They are set forth herein verbatim from the transcript, without comment, in the following order: 1.) the sentencing instructions; 2.) the foreperson's question, and the judge's answer, regarding unanimity; and 3.) the sentencing form.

1. The Sentencing Instructions Required Sentencer Unanimity on Mitigation

The jurors in this case were instructed:

> I will submit to you certain issues relating to aggravating circumstances and relating to mitigating circumstances. It is for you to

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[2]A similar summary was given regarding the statutory mitigating circumstance of "age": "He contends that he is still a very young man and that is a circumstance that mitigates whatever his conduct may have been." R. 408

say whether any of them exist and, if so, which ones.

I will first read the issues to you and explain them in the order that they are listed.

Number one. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

. . . .

The second issue: Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

. . . .

The third question: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

And four: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Then there is a place and a date for the signature of the foreman of the jury.

. . . .

After considering issue number one and the subsections (A), (B), (C) and (D), you will consider issue number two which reads: "Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?"

. . . .

[Y]ou should consider all of the things that we have discussed concerning mitigation, that is, his age; the condition he was in that night, whatever you find it to have been; his mental problem, if you find that he has one;

his intoxication; his addiction to alcohol; all the circumstances that you deem to be of mitigating value or any of the circumstances you deem to be of mitigating value; and if you find from the evidence any circumstance which you deem to have mitigating value, you would answer that, "Yes." Otherwise, you would answer it, "No."

Then, members of the jury, you should go to the third issue which reads: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

As to that issue, members of the jury, if you have found at least one aggravating circumstance to exist, one or more, you would go to issue number three which reads, "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?"

Now, when you come to consider that question, it is not who has the most favorable answers to the issues and to the questions. It is not a question of numerical weight. The question is the weight of the testimony and the weight of the circumstances you find to exist as to whether those which are aggravating outweigh in your minds the mitigating circumstances. And if you find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh, that is, in value and in importance the mitigating circumstances, you would answer that, "Yes." Otherwise, you would answer it, "No."

If you answer the third issue "No," you would not consider the fourth issue, and under those circumstances you would stop there and recommend life in prison, but if you answer that issue "Yes," you will go to the fourth issue which reads: "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?"

> This is simply a matter for you to determine, members of the jury, based upon your findings concerning the aggravating and mitigating circumstances.

(R. 393-413; emphasis added).

2. The Judge Answered The Foreman's Question For the Sentencers -- A Finding On Mitigation Had To Be Unanimous.

After the jurors retired to deliberate penalty, they returned to the courtroom and asked the judge to clarify parts of the jury instructions. As the judge was explaining the statutory mitigating circumstance of mental or emotional disturbance, the foreman asked the judge point blank whether that mitigating circumstance had to be unanimously found before it could be considered, and the judge replied that it did:

> [THE COURT] That is to say, if he was under the influence of mental or emotional disturbance at the time of the murder, you should answer that, "Yes." If he was not or if you do not find that he was ... you would answer it, "No."
>
> FOREMAN: When you say "find", you mean unanimously find?
>
> THE COURT: Yes, sir. Yes, sir.
>
> FOREMAN: Thank you, sir.

(R. 413; emphasis added).

3. The Jurors' Sentencing Form Required Unanimity.

The jury took to the jury room a form entitled "ISSUES." On that form the jury provided the following answers to the following questions.

1. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary?

Answer: Yes.

(B) Was the murder committed while the defendant was engaged in a sex act.

Answer: Yes.

(C) Was the murder committed for pecuniary gain?

Answer: Yes.

(D) Was the murder especially heinous, atrocious or cruel?

Answer: Yes.

2. Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity?

Answer: Yes.

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

Answer: No.

(C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

Answer: No.

(D) The age of the defendant at the time of the murder.

Answer: No .

(E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

Answer: No .

3. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

Answer: Yes .

4. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Answer: Yes .

This the 20th day of November, 1981.

Charles L. Marks /s/
Foreman

We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned Foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr., be death .

This 20th day of November, 1981.

Charles L. Marks /s/

SUMMARY OF ARGUMENT

1. The Court of Appeals granted sentencing relief to Douglas Williams because his capital sentencing proceedings did not comport with the Eighth and Fourteenth Amendments as applied in Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990). For two reasons the court declined to address whether Mills and McKoy constituted "new law" under this Court's opinion in Teague v. Lane, 489 U.S. 288 (1989). First, the court held that the State had waived any non-retroactivity issue by failing to raise that issue in the district court or until after briefing and argument on appeal. Second, the Court held that even if Mills or McKoy were "new law", they came within an exception to the rule of non-retroactivity.

In its petition the State, in its second question presented and its second argument, purports to present the "waiver" issue as a basis for certiorari. But what the State represents to be the ruling by the lower court on this issue is not a complete or fair recitation of what the lower court actually held. The State writes that the lower court held only that non-retroactivity was an affirmative defense which had to be raised in the district court or it was waived. That is not why the State lost in the lower court.

The State's obfuscation on this issue is startlingly misleading. What the State failed to discuss in the petition is

that the lower court found waiver not just because of what the State did in the district court, but because of what the State did in the Court of Appeals. What the State actually did was the following:

a) in the Court of Appeals the State relied in its appellate brief and in oral argument on Teague v. Lane, 489 U.S. 288 (1989), as a bar to habeas corpus relief with respect to a claim under Ake v. Oklahoma, 470 U.S. 68 (1985); but

b) did not rely in its appellate brief or in oral argument on non-retroactivity as a bar to relief with respect to Douglas Williams' claim under Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 486 U.S. 367 (1988), choosing instead to respond to the Lockett/Mills claim on its supposed lack of constitutional merit; and,

c) waited until one week after the State's merits contention on the Lockett/Mills claim was rejected by this Court in McKoy v. North Carolina, 494 U.S. 433 (1990), to assert any non-retroactivity contention regarding the Lockett claim, well after oral argument and briefing.

The lower court found that under all of these facts, decidedly not just the single failure to assert non-retroactivity in the district court, the State had waived the issue of non-retroactivity. This conclusion cannot seriously be posited by the State as a basis for certiorari, and so it is not mentioned at all in the petition. Under the Federal Rules of Appellate Procedure, the contentions of the parties must be stated in their

briefs, and a failure to so state a contention routinely results in waiver of that contention. Having raised Teague as to one claim in its brief and argument, and having not raised Teague as to this Lockett claim, the State intentionally gambled on the merits of the Lockett claim. There is no split of authority on whether this constitutes a waiver of non-retroactivity, this basis for the lower court's judgment has not been challenged in the petition, and consequently the petition should be denied.

2. In its second question presented and second argument, the State has represented to this Court that there is a split in the lower federal courts regarding whether non-retroactivity is an affirmative defense which must be raised in the district court in response to a petition for writ of habeas corpus. None of the cases cited by the State even discuss "affirmative defense," and a fortiorari, none of the cases hold that non-retroactivity is an affirmative defense. Instead, the cases relied upon by the State are entirely consistent with what the lower court did in this case and reveal that no issue worthy of certiorari review arose when the lower court would not allow the State to withhold the "defense" of non-retroactivity until it became necessary to use it.

3. The lower court did not address whether Mills or McKoy were "new law" for non-retroactivity purposes. That question is not contained in the petition as a basis for certiorari. Should this Court grant the petition and ultimately reverse the lower court, then the lower court will have to address the new law

issue. Douglas Williams' sentence must be vacated as a result of the law that existed when the sentence became final, and reversing the lower court would not change the result in this case.

Douglas Williams' conviction and death sentence became final on direct appeal when this Court denied his petition for writ of certiorari on October 3, 1983. Williams v. North Carolina, 464 U.S. 865 (1983). "This Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before [Douglas Williams'] conviction became final. Under the retroactivity principles adopted in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), [Douglas Williams] is entitled to the benefit of those decisions." Penry v. Lynaugh, 109 S.Ct. 2934, 2944-45 (1989).

Lockett and Eddings require that limitations or impediments to sentencer consideration of relevant mitigating circumstances be stricken. A requirement of unanimity on a finding of mitigating circumstances is such an impediment. Indeed, the State recognized this controlling and axiomatic Eighth Amendment principle ten years ago in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988). There the State contended that "no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do

otherwise, the state believes, could run afoul of Lockett v. Ohio, supra." Brief for the state filed December 10, 1982, State v. Kirkley, No. 15A-81; see also State v. Kirkley, 302 S.E.2d 144, 163 (1983) (Exam, J. dissenting) (quoting State's brief). Over the years since Lockett the Lockett rule has not changed, and its application in Douglas Williams' case requires relief to be granted.

4. The lower court correctly found that a prohibition on a requirement of sentencer unanimity on a finding of a mitigating circumstance was a bedrock procedural requirement necessary to make capital sentencing determinations reliable.

REASONS WHY THE WRIT SHOULD NOT ISSUE

ARGUMENT

I.

THE STATE'S PETITION IS MISLEADING RECARDING THE BASES FOR THE LOWER COURT'S OPINION AND REGARDING THE STATE'S CONDUCT WHICH WARRANTED THE ACTION TAKEN BY THE LOWER COURT. WHAT THE LOWER COURT ACTUALLY HELD IN LIGHT OF THE STATE'S CONDUCT IS NOT WORTHY OF REVIEW -- THAT THE CONTENTIONS OF THE PARTIES ON APPEAL MUST BE STATED IN THEIR BRIEFS AND AT ORAL ARGUMENT.

In its petition the State does not dispute that Douglas Williams' capital sentencing proceeding was conducted in violation of the Eighth and Fourteenth Amendments. Neither does the State dispute that a new sentencing proceeding is required if the holdings in Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990), are applied to Petitioner's case.[3] These conclusions by the United States Court of Appeals for the Fourth Circuit are unchallenged.

In the lower court, the State did argue that a capital sentencing scheme which required unanimity before a finding of a mitigating circumstance did not run afoul of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), and was constitutional. After Mills was announced, the State continued to press for resolution of the merits of this Lockett claim, arguing in the district court and in the court of appeals

[3]The sentencers were precluded from considering record evidence of, among other things, the defendant's age (19), his mental retardation, and his degree of intoxication, unless the jurors unanimously agreed that such factors were mitigating circumstances.

(in its brief and at oral argument) that Mills did not apply to North Carolina. After briefing and oral argument in the court of appeals, McKoy was decided in this Court. With that setback, the State attempted to raise the argument that non-retroactivity principles barred relief on the mitigation unanimity issue. The Court of Appeals treated the State's belated assertion of non-retroactivity in two, independent ways. As discussed in this argument, the court ruled that the State had waited too long on appeal to raise the issue. The Court also ruled that Mills fit an exception to non-retroactivity. See Argument IV, infra.

With respect to the "sandbagging" issue, the State contends that this case presents the following question: "Whether Teague is an affirmative defense which must be raised by the State in the district court or else is waived." Petition, p. i, question II. The State then argues that the writ should issue because "[t]he Fourth Circuit's decision on nonretroactivity as an affirmative defense adopts a position which is in conflict with the majority of the other circuits on this issue, and raises an important issue warranting review on certiorari." Petition, p. ii. Assuming for the sake of argument that this issue stated by the State is an important one, is an inherent part of this case, and that upon that issue there is a split in the circuits,[4] certiorari still should not be granted.

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[4]There is in fact no split in the circuits regarding the manner in which the lower court resolved the issues. The cases relied upon by the State to demonstrate such a split do not even address the issue which the state claims they address. See Argument II, infra.

This Court could completely agree with the State's arguments and the state would still lose. This is because the State did much more than not raise non-retroactivity in the district court -- the State did not raise the issue in its brief or at oral argument, and the Court of Appeals based its judgement on that critical additional failure by the State.[5] What the lower court held was that "the State waived any Teague defenses to the retroactive application of these rules by its failure to raise the issue at the district court level or at the first hearing [oral argument] before this Court." Williams, A 24.[6]

The State's petition does not mention this important component of the lower court's ruling. If the lower court was

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[5]Whether a defense is "affirmative" and must be raised in the district court is one question. Whether a party must "brief" and "argue" contentions in an appellate brief and at oral argument is a separate issue. The lower court found that the State had neither raised the issue in the district court nor relied upon it in its brief and oral argument on appeal. Even if the "affirmative defense" issue is worthy of review, which it is not, see Argument II, infra, the lower court's judgment would nevertheless stand on the "must brief and argue on appeal" issue.

[6]As the lower court further explained, "[d]espite the fact that Williams raised the Mills issue before the district court, the State admittedly did not raise the retroactivity issue until after the McKoy decision was rendered. At that time, and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time." Williams, supra, A. 19. The court then wrote that it was not just the failure to raise the issue in the district court but also the failure to raise the issue in a timely manner during the appeal process that barred the State: "Because of the State's failure to raise the issue until after the district court's decision and this court's first hearing on appeal, we are confronted with the issue of whether the State's failure amounts to a waiver of the issue." Id.

empowered to bar the Teague issue because it was not timely raised on appeal, then the State's petition for writ of certiorari should be denied, even if it contains other issues worthy of certiorari. Addressing such other issues would be largely advisory -- even if Teague would bar relief, and even if McKoy does not fit an exception to Teague, the State's appellate level waiver spells relief for Douglas Williams.

The lower court was empowered to bar the Teague issue, based upon the State's conduct. Failure to raise issues on appeal in an appropriate manner routinely results in their waiver, and for a Court of Appeals to enforce such a fundamental waiver is not a matter warranting certiorari review. There is no conflict in the lower federal courts with respect to the propriety of such an exercise of discretion by a federal appellate court, and the manner in which the Court of Appeals acted raises no important question warranting review.

To reach its ruling, the Court of Appeals first looked to this Court's jurisprudence regarding non-retroactivity and whether it is a jurisdictional issue. This Court has instructed the lower federal courts that "[a]lthough the Teague rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte." Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2718 (1990). Citing Collins, the Court of Appeals began with the pedestrian proposition that it could, but was not

required to, consider non-retroactivity when the State failed to raise the issue.

The Court of Appeals then correctly concluded that the State had not raised the issue. To raise an issue, a party must present the issue in that party's initial brief. F.R.A.P. Rule 28(a)(2) and 28(b). Issues not raised in the briefs and raised for the first time in oral argument or through notice of supplemental authority need not be addressed by a Court of Appeals and can be deemed waived. This rule is fundamental and is routinely enforced throughout the federal courts. See Piazza v. Aponte Rogue, 909 F.2d 35, 37 (1st Cir. 1990) ("Except in extraordinary circumstances not present here, a court of appeals will not consider an issue raised for the first time at oral argument."); Playboy Enterprises v. Public Service Commission of Puerto Rico, 906 F.2d 25. 40 (1st Cir. 1990) ("Even if the defendants had not waived this issue by failing to raise it before Judge Pieras, they waived it by raising it too late on appeal."); McGruder v. Necaise, 735 F.2d 1146, 1148 (5th Cir. 1984) ("We will not consider issues not briefed."); CH ZM Hill Central, Inc. v. Madison - Madison International, Inc., 895 F.2d 286, 290 n. 6 (7th Cir. 1989) ("It is well settled that issues not discussed in the parties' appellate briefs are waived."); Borough v. Daluth, N. and I.R. Railway, 762 F.2d 66, 68-69 n.1 (8th Cir. 1985) (issue not briefed deemed waived); Miller v. Fairchild Industries, 797 F.2d 727, 739 (9th Cir. 1986) (will not consider matters not briefed); Abercrombie v. City of Catoosa,

896 F.2d 1228, 1231 (10th Cir. 1990) ("[H]e failed to argue this issue in his appellate brief or at oral argument. Therefore we conclude that plaintiff has waived the issue."); United States v. Blasco, 702 F.2d 1315, 1332 n. 28 (11th Cir.), cert denied, 464 U.S. 914 (1983) (cannot after oral argument via a notice of supplemental authority raise an issue that was not contained in the briefs).[7]

The State did not contend in its brief or at oral argument that Petitioner's Lockett/Mills claim was subject to a non-retroactivity analysis. Instead, the State -- in its brief and during argument -- urged the Court of Appeals to rule on the merits of the claim. Upon learning that the claim had merit, the State attempted to change course, but the lower Court was unmoved:

> Even after Teague was decided, the State did not raise the retroactivity issue [vis-a-vis the Mills issue][8] in its first arguments before this Court. It was not until the decision was handed down in McKoy that the state decided to raise the retroactivity issue. We believe that was too late.

Williams, A 23.

This narrow fact-bound ruling by the Court of Appeals was correct, and even if this Court would not have so ruled the lower court's action was not an abuse of discretion and is not worthy

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[7]See 16 C. Wright, A. Miller, E. Cooper, and E. Gressman, Federal Practice and Procedure, Section 397, at 421, 427 (1977), and 1992 Supplement at pages 643-646 for statement of this axiomatic waiver rule and legion of cases applying it.

[8]As noted, Teague was relied upon by the State in its initial brief regarding an Ake claim.

of certiorari review.[9] The Court of Appeals stressed that its decision was not the result of some ironclad rule but was based upon "the facts before us." Williams, A 23. "In this case, the chronology of events is very important," Id, at 18, as it will be in every case.[10] Those facts in Petitioner's case show a conscious tactic and strategy on the part of the State not to assert a non-retroactivity defense on the Lockett/Mills claim in a timely manner, and amply demonstrate that the lower court did not act in an abusive manner.

Douglas Williams presented in his petition filed in the district court the claim that under Lockett a requirement of juror unanimity on mitigating circumstances violated the Eighth

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[9]This action by the lower court is entirely consistent with appellate procedure as detailed above, and the Court of Appeals' refusal to let the State off the hook was not an abuse of discretion. Becton Dickinson and Company v. C.R. Bard, Inc., 922 F.2d 792, 800 (Fed. Cir. 1990)("This practice [of finding waiver] is, of course, not governed by a rigid rule but may as a matter of discretion not be adhered to ....").

[10]The State's contention that the lower court's actions conflict with other Court of Appeals decisions is incorrect, but even if accurate such a conflict would present no reason for granting certiorari. First, there are no cases cited by the State which present the same facts as Douglas Williams' case: a.) the State raising non-retroactivity as to one claim but not another in appellate briefs and oral argument, and b.) later attempting to raise non-retroactivity on the other issue only after losing the merits of the other issue in this Court.

Second, when a rule of procedure is governed by an abuse of discretion standard, such as exists in the rule barring the raising of issues not raised in the briefs, then different courts will necessarily reach different conclusions even on the same facts. That does not create an issue worthy of certiorari.

In any event, the cases relied upon by the State do not show a split in the circuit court decisions, and there is not one.

and Fourteenth Amendments. The State answered that Lockett was not violated by such a requirement. Mills was decided June 6, 1988, while the habeas corpus petition was still pending in the district court. Counsel for Douglas Williams alerted the district court to Mills, and the state was directed to file a response to Mills. The State did so on July 22, 1988, and again encouraged the district court to rule against Petitioner solely on the merits of his claim. The district court did so by Order entered September 13, 1988, and denied relief on the merits.

Teague was decided five months later on February 22, 1989. The day before, February 21, 1989, certiorari was granted in McKoy. Counsel for the State in this case was also counsel in McKoy before this Court. Penry was decided June 26, 1989. At least as of that date, counsel for the State knew that this Court could rule in McKoy in favor of the merits position being asserted by Douglas Williams, and that capital habeas corpus petitioners faced serious new obstacles when seeking relief on the basis of new rules.

Counsel for Douglas Williams cited in the Brief of Appellant filed in the court of appeals the grant of certiorari in McKoy. The State filed its brief on August 29, 1989. The State was well aware of Teague, and its rule of non-retroactivity, when the Brief of Appellees was filed. The State expressly relied upon Teague with respect to one issue raised by Petitioner. In the text of the Brief of the Appellees on page 101, the state wrote that Teague prohibited the retroactive application of Ake v.

Oklahoma, 470 U.S. 68 (1985) to Petitioner's case. See Brief of Appellees, p. 101, n.17 ("Indeed, Ake appears not to be retroactive to cases on collateral review. Thus, any claim to a due process right to experts based upon Ake cannot be of benefit to Williams. Teague v. Lane, supra.").[11]

Oral argument was held November 2, 1989. At oral argument, the State urged the positions contained in the State's brief. Before oral argument, counsel for Douglas Williams sought to have the proceedings held in abeyance because McKoy would control Petitioner's case. See Motion to Postpone Oral Argument Pending Decision in McKoy v. North Carolina. The State responded to the Motion, again without relying upon non-retroactivity.

Four months later McKoy was decided. As the Court of Appeals wrote, "[d]espite the fact that Williams raised the Mills issue before the district court, the State admittedly did not raise the retroactivity issue until after the McKoy decision was rendered. At that time, and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time." Williams, supra, A 19.

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[11]The State also had read Penry v. Lynaugh, 492 U.S. 302 (1989), before filing Respondent's brief and relied upon and cited Penry at page 79 of its brief, albeit not for retroactivity purposes. Inasmuch as counsel had read Penry, then the non-retroactivity language in Penry was known by the State when the State's brief was filed.

Under the case law, a clearer case of waiver could not be constructed. Non-retroactivity as to one issue was raised in the State's brief; it was specifically not raised, however, as to the Mills/McKoy issue, which the State chose to tackle strictly on the merits. That position proved to be ill-advised, but that does not relieve the State of its considered choices and their consequences.

The State seeks in its petition to be forgiven for its actions by asserting two unconvincing rationales. First, the State contends that at the relevant times, i.e., during briefing and argument before the court of appeals, the meaning of Teague was "in doubt," was not "clarified," had not been "made clear," and that the State asserted Teague as a defense to Douglas Williams' claim the moment the defense became "plausible," which was not until this Court decided "Saffle, Sawyer, and Butler." Petition, pages 20-21. This explanation does not hold water, inasmuch as the State was not so baffled by Teague as to fail to include it as authority in its Brief with respect to the purported non-retroactivity of Ake. The State cannot explain how Teague was a "plausible" defense vis-a-vis Ake but not other issues.

Second, the State contends that "this Court did not make clear until McKoy that there was to be a 'new rule' which the state should seek to defend as non-retroactive ...." Petition,

page 20.[12] Teague and Penry made clear that the time for the State to argue against application of a new rule is when a petitioner seeks its announcement or its benefit in federal habeas corpus proceedings. Indeed, no new rule will be announced in habeas corpus actions if the State or court raises Teague. That is the reason for Teague. Here the State, relying on its assumed persuasive power before this Court in McKoy, took the chance that there would be no rule that would benefit Petitioner. Counsel was wrong. Counsel being wrong is not a basis for certiorari review, and can hardly form the basis for suggesting that a Court of Appeals abused its discretion.

What the State of North Carolina seeks is a new rule which would require a Court of Appeals to entertain State contentions which are first presented when an opinion is imminent and which are contrary to the positions taken in the briefs, pressed by the State, and earnestly urged on the Court of Appeals for years. While it may be that a Court of Appeals may consider such eleventh hour contentions by a state, there is no requirement that a Court of Appeals do so, absent jurisdictional concerns, and no issue worthy of certiorari arose when the Court of Appeals declined to excuse the State's sandbagging.

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[12]Douglas Williams' position is that McKoy did not establish a new rule. The lower court did not hold that any new rule had been established, and the State did not present in its petition the issue of whether McKoy involves a new rule. See Argument III, infra.

ARGUMENT

II.

NO CASES RELIED UPON BY THE STATE EVEN REFER TO TEAGUE AS AN AFFIRMATIVE DEFENSE, AND, BASED UPON THE STATE'S CASES, THERE IS NO SPLIT OF AUTHORITY AFTER COLLINS V. YOUNGBLOOD, 497 U.S. 37 (1990), REGARDING WHETHER THE STATE CAN WAIVE THE ISSUE OF NON-RETROACTIVITY.

The petition reads: "the Fourth Circuit's decision on non-retroactivity as an affirmative defense adopts a position which is in conflict with the majority of the other circuits on this issue, and raises an important issue warranting review on certiorari." There not only is no "sharp division" regarding the actions taken by the lower court, there also is no mention of Teague as an affirmative defense in any of the cases relied upon by the State.[13] The petition should be denied.

Some of the cases cited by the State do reach different results on the similar issues that they do address, but those different results are attributable to whether the opinion in question was announced before or after this Court's decision in Collins v. Youngblood, 497 U.S. 37 (1990). Before Youngblood, some Courts felt compelled to reach the Teague issue because it

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[13]At pages 18-19 of the petition the State presents eight cases which the State contends reveal "sharp division" on this issue. While Douglas Williams does concede that two dissenting judges in Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989)(en banc), have disagreed with each other about whether non-retroactivity is an affirmative defense, as noted at page 19 of the petition, those two dissenting opinions contain the only reference to Teague as an affirmative defense to be found in the eight opinions posited by the State as illustrating a conflict in the circuits on the affirmative defense issue. The petition is seriously misleading.

was thought to be jurisdictional; after Youngblood clarified that the issue was not a jurisdictional one, courts turned to the facts of individual cases to determine whether the equities warranted reviewing the tardy Teague issue.[14] The Court of Appeals' decision below is perfectly in harmony with all these other post-Youngblood decisions relied upon in the State's petition, and there is no split discernable in the circuits regarding whether waiver can be considered.

The only two opinions cited by the State which could arguably be in conflict with the result in Petitioner's case were decided before Youngblood and both suffer from a "non-retroactivity is jurisdictional" flavor. Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989), and Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir 1989) (en banc), emulated this Court's actions in Teague by addressing non-retroactivity despite its not having been raised by the parties. Given Teague, in which this Court addressed the issue sua sponte, it was not unreasonable for a lower court to worry that the retroactivity issue was not simply a "threshold" habeas corpus issue but a threshold jurisdictional issue. These two court of appeals decisions reflect this jurisdictional concern. See Hill v. McMackin, supra, 893 F.2d at 813 (in light of Teague, court felt "compelled" to address non-

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[14]Collins v. Youngblood was decided June 21, 1990. In Youngblood, this Court wrote that "[a]lthough the Teague rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte." Collins v. Youngblood, 110 S.Ct. 2715, 2718 (1990).

retroactivity, although not raised by the parties); Hopkinson v. Shillinger, 888 F.2d at 1288 ("[W]e sua sponte raised the issue in this case because the very scope of the writ of habeas corpus, and therefore our power to grant the writ is implicated. Cf. Teague.") (emphasis added).[15]

Post-Youngblood opinions cited by the State are directly in line with the decision below. First, the State cites Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc), ostensibly to point out its conflict with Hill v. McMackin, supra. But both are Sixth Circuit opinions, and the comparison between them is telling. The pre-Youngblood Sixth Circuit opinion (McMackin) addressed Teague notwithstanding the parties' failures to raise it. The post-Youngblood Sixth Circuit opinion -- Kordenbrock -- addressed the substantive merits of a constitutional claim because the State at no time argued non-retroactivity and so had "waived" it.[16]

The remaining opinions cited by the State -- Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990), Boardman v. Estelle, 957 F.2d 1523 (9th Cir. 1992), Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1991), Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (en banc),

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[15]Neither of these cases have anything to do with the State attempting to raise non-retroactivity late in the appellate process. Instead, they involve Court injected concerns that non-retroactivity had to be addressed.

[16]To whatever degree the panel opinion in Hill v. McMackin is inconsistent with the en banc opinion in Kordenbrock, Kordenbrock controls, Hill v. McMackin is no longer the law in the Sixth Circuit, and the Sixth Circuit position does not conflict with the Fourth Circuit's position reflected in the opinion below.

and Smith v. Black, 904 F.2d 950 (5th Cir. 1990), Petition at 18-19, also show that there is no post-Youngblood split in the circuits. Card, Boardman, and Hanrahan hold that the State can waive the issue of non-retroactivity,[17] Moore v. Zant has nothing at all to do with the issue,[18] and Smith v. Black has been vacated and, even were it still in existence, is consistent with the decision in this case.

In Card and Boardman (as in Douglas Williams' case), the courts mention Youngblood and then set about deciding whether the court must address an unraised non-retroactivity issue. In Card, the court ruled that because the issue of non-retroactivity had not been raised by the state and was not jurisdictional, the court would not sua sponte address it. In Boardman, the court declined to allow the State to assert Teague for the first time in a petition for rehearing. The court cited Youngblood and ruled that "courts of appeals have discretion, but are not required, to address a Teague defense raised for the first time on appeal (or, perhaps, in a petition for rehearing)." Boardman, 957 F.2d at 1537.[19]

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[17]Again, the concept of "affirmative defense" is not mentioned in any of these opinions.

[18]See footnote 13, supra.

[19]As the court wrote:

> We will not save the state from such a gaffe. The Supreme Court has enforced strict procedural forfeitures on habeas petitioners in the interests of efficient and final adjudication. Why should not the state be

(continued...)

In Black v. Smith, which this Court has now vacated, 112 S.Ct. 1463 (1992), the Court of Appeals had requested supplemental briefs "on the issues spawned by Teague," Smith, 904 F.2d at 981, n.12, issues which no party had raised. Upon receiving these briefs, the Court ruled that the "better choice" under the circumstances was to address Teague. Id.[20] Smith is not inconsistent, and does not conflict, with the result below. First, Smith involved a court deciding on its own that it wished to address non-retroactivity. Clearly a court may do that, and the lower court acknowledged in Douglas Williams' case that it could have entertained non-retroactivity. What Smith underlined was that when the parties have not raised the issue it is a federal appellate court's choice whether to address non-retroactivity. Smith said nothing about waiving non-retroactivity. It spoke only to whether a Court could consider

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[19](...continued)
similarly held to a pedestrian rule of appellate procedure?

Boardman, 957 F.2d at 1537. This Court denied the State's petition for writ of certiorari in Boardman on October 5, 1992. In that petition the State challenged the finding of waiver.

[20]Youngblood was decided five days before the Fifth Circuit's opinion in Smith v. Black. At footnote 12 of the Smith opinion the court stressed that this Court had sua sponte addressed retroactivity in Teague and Saffle v. Parks, 110 S.Ct. 1257 (1990). Based upon this Court's actions there, and the fact that the Smith court had requested and received briefs specifically on the Teague issue, the Smith court considered it proper to address non-retroactivity.

In footnote 12 in Smith this Court's Youngblood opinion is noted with a "Cf." signal. It appears that the Smith opinion was virtually completely written when this Court decided Youngblood, and Youngblood was added to this almost finished product.

non-retroactivity when it had not been raised. That is a matter of "choice" under the circumstances, id, and different results will attach to different circumstances.[21] What may be the "better choice" under the circumstances in Smith may be the worse choice under the circumstances in another case, i.e., Douglas Williams' case.

No post-Youngblood opinion found by counsel is inconsistent with what the lower court did. The lower court in Douglas Williams' did not rule that there could be no circumstances under which non-retroactivity could be heard on appeal although not raised in the district court, only that "on the facts before us, the State missed the boat.'" Williams, A 23. Without regard to whether a Court may entertain non-retroactivity when not raised by the parties, there is no opinion to which the state can point post-Youngblood that holds that an appellate court must apply non-retroactivity when it is not raised at all, or when it has been held back as a defense by the state on appeal. Yet, as the State's cited opinions show, there is ample support for Douglas Williams' position and the lower court's holding that the State

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[21]Such different results do not constitute a conflict in the circuits in the Rule 10 sense of the phrase. If a rule of law allows discretion, then different results will naturally flow from application of the same rule.

can be held accountable for its actions and choices."

Certiorari should be denied.

ARGUMENT

III.

NEITHER MILLS NOR MCKOY ANNOUNCED A NEW RULE, AND THE LOWER COURT'S JUDGMENT WOULD NOT BE DISTURBED BY THIS COURT GRANTING CERTIORARI AND REVERSING.

The Court of Appeals did not find that Mills or McKoy announced new constitutional principles. The State has not presented in its petition the issue of whether new constitutional principles were announced in Mills or McKoy. If this Court grants certiorari and finds that the lower court 1.) abused its discretion by requiring that issues be presented on appeal at least by the time of oral argument, and 2.) was wrong in holding, as an alternative and independent basis for relief, that Mills/McKoy involved the second Teague exception, then on remand the Court of Appeals would be required to address the issue that

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"Another example, Hanrahan, supra, which was relied upon by the lower court, specifically holds that while a court may, it cannot be said that a court must, allow a state to hold back a non-retroactivity defense. In Hanrahan, the Seventh Circuit Court noted that, as here, the district court had requested briefs on the implications of a new decision. The state, as here, submitted a brief on the merits without any argument of non-retroactivity. It was not until appeal that the State sought to interpose a non-retroactivity claim, and the court found that that was too late.

Douglas Williams' case is consistent with, but does not go as far as, Hanrahan. The State did not raise non-retroactivity in its brief or at oral argument here. In Hanrahan, the State at least sought to interpose the issue through its briefs.

it reserved, i.e., whether Mills and McKoy involve a new rule.[23] Because they do not involve a new rule, ultimately the same judgment would be entered by the Court of Appeals -- sentencing relief for a nineteen year old mentally retarded defendant.

The jury instructions and judge comments at Douglas Williams' capital sentencing proceeding created the intolerable risk that Douglas Williams was sentenced to death without receiving juror consideration of his sub-average intellectual functioning, youth, and impaired mental condition at the time of the offense.[24] By prohibiting juror consideration of Douglas Williams's mental retardation, for example, unless all jurors found it to be mitigating, the trial court prevented the jury from expressing a reasoned moral response to that evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).[25] This Eighth Amendment violation requires resentencing under the law existing at the time Douglas Williams' conviction became final. Douglas Williams would be entitled to

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[23]The State has not presented as a supposed basis for granting certiorari that Mills/McKoy are new law. Consequently, that issue cannot be urged if certiorari is granted. Rule 14.1(a).

[24]As the prosecutor argued to the jury:

> I'm sure [defense counsel] will argue to you that the defendant has a low I.Q. [63], and you shouldn't put him on trial for being stupid.

(R. 386).

[25]The State concedes that the sentencers were expressly required to be unanimous on any finding of mitigation. See Petition, p.8, n.2.

relief regardless of a grant of certiorari, and the petition should be denied.

A. At The Time The Defendant's Conviction and Death Sentence Became Final On Direct Appeal, The Eighth Amendment Dictated That No Capital Sentencer Could Be Precluded From Considering Anything Relevant That Was Offered As Mitigation.

1. Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) Require That No Sentencer Be Precluded From Considering Mitigating Evidence.

Douglas Williams' conviction and death sentence became final on direct appeal when the United States Supreme Court denied his petition for writ of certiorari on October 3, 1983. Williams v. North Carolina, 464 U.S. 865 (1983). "This Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before [Douglas Williams'] conviction became final. Under the retroactivity principles adopted in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), [Douglas Williams] is entitled to the benefit of those decisions." Penry v. Lynaugh, 109 S.Ct. 2934, 2944-45 (1989).

Both Lockett and Eddings involved restrictions on capital sentencers' consideration of mitigating circumstances, restrictions that had been condemned by this Court in 1976. Roberts v. Louisiana, 428 U.S. 325, 333 (1976)(condemning "[t]he constitutional vice of . . . lack of focus on . . . the character and propensities of the offender . . . ."); Jurek v. Texas, 428 U.S.

262, 271, 273-74 (1976) ("A jury must be allowed to consider on the basis of all relevant evidence . . . why [a death sentence] should not be imposed.") ("[A]s in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the . . . individual offender before it can impose a death sentence."); Gregg v. Georgia, 428 U.S. 187, 189 (1976) ("We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account . . . the character and propensities of the offender.' Pennsylvania ex. rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937).").

In Lockett, the Ohio statute had limited the number of mitigating circumstances that could be considered by the sentencer; in Eddings, the sentencing judge believed he was limited in the mitigating circumstances that could be considered. This Court found that the Ohio Statute and the Oklahoma judge violated the Court's 1976 jurisprudence, see Saffle v. Parks, 110 S.Ct. 1257, 1262, 1263 (1990) ("Lockett and Eddings reaffirmed the reasoning in Jurek" and "Lockett and Eddings command that the State must allow the jury to give effect to [all] mitigating evidence in making the sentencing decision.").

It was thus black-letter Eighth Amendment law at the time of Douglas Williams' trial and appeal that the state could not impede or restrict a sentencer's -- i.e., a juror's -- consideration of relevant mitigating circumstances. For example,

prohibiting a juror from considering mental retardation to be mitigating unless all eleven other jurors believed it was, would violate Lockett, Eddings, and the Court's 1976 decisions.

This axiomatic Eighth Amendment principle was recognized by the State in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), where the State contended that "no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the state believes, could run afoul of Lockett v. Ohio, supra." Brief for the state filed December 10, 1982, State v. Kirkley, No. 15A-81; see also State v. Kirkley, 302 S.E.2d 144, 163 (1983) (Exam, J. dissenting) (quoting State's brief). The North Carolina Supreme Court decision in Kirkley rejecting the contention of both parties and holding that a requirement of unanimity on mitigating circumstances was constitutional had no Eighth Amendment moorings.[26]

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[26]As far as Petitioner can determine, no other court has held that such a unanimity requirement would be constitutional.

2. Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 110 S.Ct. 433 (1990) Verified Douglas Williams' Claim That The Law Applicable Before His Conviction Became Final Provided That No Sentencer Could Be Precluded From Considering Anything Relevant That Was Offered As Mitigating Evidence.

The rule extant during Douglas Williams' trial and direct appeal plainly was that a sentencer could not be precluded from considering relevant mitigating evidence when determining whether to sentence a person to death. See, e.g., Jurek; Gregg; Lockett; Eddings, supra. While there were certainly myriad ways to violate this rule, see, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (from instruction to jury not to consider nonstatutory mitigating circumstances, and refusal by sentencing judge to consider the same, "it could not be clearer . . . that the proceeding . . . did not comport with the requirements of . . Eddings . . . and Lockett . . . ."); Skipper v. South Carolina, 476 U.S. 1 (1986) ("It can hardly be disputed" that exclusion of evidence regarding defendant's post-offense conduct violated Lockett and Eddings); Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989) ("Our reasoning in Lockett and Eddings . . . compels a remand for resentencing" in the "absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation . . . ."), there was nevertheless one clear and simple rule: a juror could not be prohibited from considering mitigation. The source of the

restriction might always be different; the legal result of the restriction would remain constant -- reversal.

In 1987, Hitchcock applied, and did not change, the rule of Lockett and Eddings -- "our cases hold that the exclusion of mitigation evidence of the sort at issue here renders the death sentence invalid." Hitchcock, supra, 107 S.Ct. at 1824 (emphasis added). In 1989, Penry applied, and did not change, the rule of Lockett and Eddings -- "[u]nderlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant . . . [and] our reasoning in Lockett and Eddings thus compels a remand for resentencing . . . ." Penry, 109 S.Ct. at 1952 (emphasis added).

In 1988, in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), the Court applied, but did not change, the rule of Lockett and Eddings, "our current death penalty jurisprudence," id., 108 S.Ct. at 1862 (Brennan, J. concurring):

> [I]f Petitioner is correct, a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death. See 310 Md., at 67, 527 A.2d, at 19. Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by an evidentiary ruling, Skipper v. South Carolina, supra. The same must be true with respect to a single juror's holdout of a mitigating circumstance. Whatever the cause, if Douglas Williams's interpretation of the sentencing process is correct, the conclusion would be necessarily the same: "Because the

> [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117, n.*, 102 S.Ct., at 878, n.* (O,CONNOR, J., concurring).

Id., 108 S.Ct. at 1866 (emphasis added).

Again, the legal rule is that no barrier can be raised to a juror's consideration of relevant mitigating evidence. Since 1976, when this Court sees a barrier to sentencer consideration of mitigating evidence, "whatever the cause," "the same must be true," that is, resentencing. This legal rule is immutable, it is not evolving, and when any facts violate it "the [legal] conclusion would be necessarily the same." Id (emphasis added).

McKoy v. North Carolina, 110 S.Ct. 1227 (1990), came after Mills, but both cases were "compelled," McKoy, supra, 110 S.Ct. at 1232, by Eddings and Lockett,[27] see McKoy, supra, 110 S.Ct. at 1231 ("The unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a 'sentence less than death.' Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett, supra, at 604, 98 S.Ct., at 2964, (plurality opinion).") We begin with Mills, then, only as a nod to chronology.

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[27]The decision in McKoy would have been the same with or without Mills, see McKoy, supra, 110 S.Ct. at 1234, n.8 ("In fact, this case [McKoy] presents an even clearer case for reversal than Mills . . . ."), because it is Lockett and Eddings that compel the result, not Mills.

Mills held that the following two capital sentencing scenarios would present the "height of arbitrariness" which "beyond dispute" would violate Eddings and Lockett. Mills, supra, 108 S.Ct. at 1865. First, a scheme that provides that "[i]f eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found," would plainly fail under Eddings and Lockett. Second, a scheme that allowed death in a situation in which "[a]ll twelve jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstances . . . [b]ut . . . all 12 could [not] agree that the same mitigating circumstance was present," id., would be patently unconstitutional.

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980)(plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the [two] circumstances so postulated . . . . It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978)(plurality opinion)(emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-1671, 90 L.Ed.2d 1 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering

> 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114, 102 S.Ct., at 877.

Id. (footnotes omitted).

Even the Maryland Court of Appeals "did not dispute that if the statute and form were read as Petitioner suggested, jurors would be improperly prevented from giving due consideration to mitigating evidence." Id., 108 S.Ct. at 1864 (emphasis in original).[28] The only issue was whether the Mills jurors interpreted the jury instructions to require unanimity regarding mitigation. Id., 108 S.Ct. at 1867 ("While conceding that the Court of Appeals construction of the jury instructions and verdict form is plausible, we cannot conclude, with any degree of certainty, that the jury did not adopt Petitioner's interpretation of the jury instructions and verdict form.")

In McKoy the unanimity restriction was explicit, and required no interpretation by the Court. McKoy, supra, 110 S.Ct. at 1234, n.8 ("In this case, by contrast [with Mills], the instructions and verdict form expressly limited the jury's consideration to mitigating circumstances unanimously found.") The Court swept aside the North Carolina Supreme Court's refusal to accept the obvious consequence that the Eighth Amendment was violated by the unanimity requirement, again explained Lockett and Eddings, gently chided North Carolina's "purported" and

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[28]It appears that the North Carolina Supreme Court has stood alone in contending that a unanimity requirement for the finding and consideration of mitigating circumstances did not violate Lockett.

"inventive attempts to distinguish Mills," id., at 110 S.Ct. at 1231, and held that, with or without the aid of Mills ("In fact, this case presents an even clearer case for reversal than Mills . . . ", id., 110 S.Ct. at 1234, n.8), reversal was mandated.

Mills and McKoy thus support what Douglas Williams has argued all along, and what the State argued in the State's brief to the North Carolina Supreme Court in Kirkley. No juror may be precluded from considering relevant mitigating evidence when the juror is deciding whether a defendant should live or die. Florida ignored the rule for years, but it was this basic rule that mandated the result in Hitchcock. Texas violated the rule for years, but it was this basic rule that mandated Penry. North Carolina violated the rule for years, but it was this basic rule that mandated McKoy.

B. This Court's Recent Decisions Regarding Retroactivity Support the Contention That The Law At The Time Of Douglas Williams' Trial And Direct Appeal Prohibited Any Restraint On A Juror's Duty To Consider Mitigating Evidence.

As noted above, when the State lost McKoy in the United States Supreme Court, the State, for the first time in over six years of litigation on this Lockett claim in Douglas Williams' case, suggested to the court of appeals that "the relief now sought by Williams based upon McKoy would create a new rule under Teague v. Lane[, 109 S.Ct. 1060 (1989),] and Penry v. Lynaugh[, 109 S.Ct. 2934 (1989).]" See Respondent's Citation of Additional Authorities dated March 12, 1990; see also Respondent's Citation of Additional Authorities dated October 30, 1990. Of course,

Douglas Williams always presented his claim as an Eddings and Lockett claim and sought relief based upon that law which controlled at the time his conviction became final on direct appeal. His claim is hardly "based upon McKoy"; McKoy simply proves that Douglas Williams has been correct all along.

And that is what Penry and Saffle show as well. In Penry, the Petitioner alleged that the Texas sentencing scheme as applied in his case precluded sentencer consideration of, among other things, his mental retardation. This was because the jury was asked to address only three questions, none of which fully allowed consideration of Penry's evidence in mitigation.

> Although Penry offered mitigating evidence of his mental retardation and abused childhood as a basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation? The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence.

Id., 109 S.Ct. at 2947. This Court considered Teague v. Lane, 109 S.Ct. 1060 (1989), before addressing the Petitioner's claims for relief because in Teague the Court determined that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague, 109 S.Ct. 1060. "In Teague, we defined a new rule as a rule that 'breaks new ground,' 'imposes a new

obligation on the States or the Federal government,' 'or was not dictated by precedent existing at the time the defendant's conviction became final.' Teague, supra, 489 U.S. at ___, 109 S.Ct. at ___. (emphasis in original)." Saffle v. Parks, 110 S.Ct. 1257, 1260 (1990). The Penry Court recognized what Douglas Williams has always contended:

> The rule Penry seeks - - that when such mitigating evidence is presented, Texas jurors must, upon request, be given instructions that make it possible to give effect to that mitigating evidence in determining whether the death penalty should be imposed - - is not a 'new rule' under Teague because it is dictated by Lockett and Eddings.

Id., 109 S.Ct. at 2947. The Penry Court wrote precisely what Douglas Williams has argued: a.) a juror must not be precluded from considering mitigation evidence, and b.) this is not a new rule.

In Saffle v. Parks, 110 S.Ct. 1257 (1990), the Court further explained that no new rule was involved in the notion that jurors may not be precluded from considering mitigating evidence. In Parks, the Petitioner sought application of a rule "that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence." Id., 110 S.Ct. at 1260. In its explanation of why Petitioner Parks' rule would be a new rule, the Court verified that the rule Douglas Williams espouses is not. "[W]hether the state may instruct the sentencer to render its decision on the evidence without mercy" involves not "what mitigating evidence the jury

must be permitted to consider . . . but . . . how it must consider the mitigating evidence." Id., 110 S.Ct. at 1261.

> There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the state may guide the jury in considering and weighing those factors in reaching a decision.

Id., 110 S.Ct. at 1261. Williams wishes to receive application of the "what factors the jury must be permitted to consider" rule, not a "how the state may guide the jury in considering those factors" rule, which is the difference between Penry and Parks:

> To the extent that Penry's claim was that the Texas system prevented the jury from giving any mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. Lockett and Eddings command that the state must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. Here, by contrast, there is no contention that the state altogether prevented Parks' jury from considering, weighing, and giving effect to all the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered . . . . [T]he former contention would come under the rule of Lockett . . . .; the latter does not.

Id., 110 S.Ct. at 1261-62. Douglas Williams contends that the unanimity requirement "would come under the rule of Lockett," id., a proposition which the McKoy Court readily affirmed.[29]

Hence, Douglas Williams is entitled to relief because the rule of Lockett and Eddings controlled when his sentence became final and require the relief he seeks.

ARGUMENT

IV.

PROHIBITING A REQUIREMENT OF SENTENCER UNANIMITY ON A FINDING OF MITIGATION IS IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND ACCORDINGLY PROVIDES RELIEF TO DOUGLAS WILLIAMS

Douglas Williams believes that non-retroactivity is not a concern in this case (as did Respondent, until McKoy issued). If retroactivity is a concern, and if Mills/McKoy are new law, Douglas Williams is still entitled to relief based upon the lower

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[29]Other federal courts have found no "new law" component respecting Mills issues. See, e.g., Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc) (Mills applied to case in which conviction was final before Mills and McKoy); Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989) ("The case [Mills] is written as a standard application of the rule that juries must be free to consider any and all evidence as a mitigating factor. This has been a familiar feature of the legal landscape since 1978, when Lockett v. Ohio was decided."); Davis v. Maynard, 869 F.2d 1401 (10th Cir. 1989); Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989); Dunkins v. Jones, Case No. CV86-H-2264-S (N.D. Ala. July 12, 1989) ("[I]t is plain that Mills v. Maryland does not constitute 'new law' . . . .) (Slip opinion at p. 25, n. 12); Byrd v. Delo, 733 F.Supp. 1334, 1343 (E.D. Mo. 1990); but see Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala. 1990) (in a successor habeas petition setting, the court simply wrote without any explication that Mills announced a new rule).

court's correct conclusion that the second Teague exception was implicated.

The non-retroactivity doctrine has two exceptions, one that is especially relevant here. The Mills rule must be considered to be "'implicit in the concept of ordered liberty,'" Teague v. Lane, 109 S.Ct. 1060, 1075 (1989)(citation omitted), which requires the Mills rule to be applied in Douglas Williams' case as an exception to the rule barring retroactive application of new rules. In particular, if a new rule goes to the "accuracy" or the "fundamental fairness" of a criminal proceeding, id., 109 S.Ct. at 1076, then the new rule must be given retroactive effect.

Prohibiting a requirement of unanimity before mitigation may be considered is based upon the need and desire to have accurate and reliable sentencing determinations. Mills, supra, 108 S.Ct. at 1870. If a unanimity requirement creates "the height of arbitrariness," as the Court found in Mills, supra, 108 S.Ct. at 1865, then the elimination of that arbitrariness has as its very purpose an attempt to improve accuracy. If one of Douglas Williams' jurors prevented all of the jurors from considering mental retardation as mitigating by refusing to agree that it was, which is what the instructions allowed here, then Douglas Williams did not receive an accurate, reliable, and meaningful determination of whether death was proper.

Removing such a barrier to sentencer consideration of mitigating circumstances is "'implicit in the concept of ordered

liberty.'" Williams, A. 15 (citation omitted). Certiorari should be denied.

CONCLUSION

For the reasons stated above, and for the reasons stated in the opinion of the United States Court of Appeals for the Fourth Circuit, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

*MARK EVAN OLIVE
2804 Glennis Court
Tallahassee, FL 32304
(904) 644-7710

Attorney for Respondent

* Counsel of Record

NO. 92-111

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,

Petitioners,

v.

DOUGLAS WILLIAMS, Jr.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, Mark E. Olive, a member of the Bar of this Court, hereby certify that I have this day served counsel for Petitioners with a copy of Respondent's Brief in Opposition and Motion to Proceed in forma pauperis, by placing a photocopy of said documents in the United States Mail addressed to Barry S. McNeill, Assistant Attorney General, 104 Fayetteville Street Mall, Raleigh, N.C., 27602, with sufficient postage to effect service.

This the 20th day of October, 1992.

MARK EVAN OLIVE

2. Respondent was allowed to proceed in forma pauperis in the district court and in the court of appeals.

WHEREFORE, Respondent respectfully requests that the Court enter an order allowing him to proceed in forma pauperis.

Respectfully submitted:

*MARK EVAN OLIVE
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710
Attorney for Respondent

* Counsel of Record

MARK EVAN OLIVE
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October 13, 1992

Frank Lorson, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: 92-111, Dixon v. Williams

Dear Mr. Lorson:

As we discussed by telephone today, I am unable to file the op. cert in Dixon v. Williams by October 14, 1992, as directed by the Court. Other duties unfortunately have prevented me from effectively responding to the State's petition.

I request on behalf of Douglas Williams, who I was appointed to represent in the lower court, the opportunity to file the op. cert. on October 21, 1992, and have that filing be considered timely.

Thank-you for your kind assistance.

Sincerely,

Mark E. Olive

cc: Barry S. McNeill, Esq.

MARK EVAN OLIVE
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2804 Glennis Court
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October 20, 1992

Frank Lorson, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: 92-111, Dixon v. Williams

Dear Mr. Lorson:

Enclosed please find the Brief in Opposition and a motion to proceed in forma pauperis on behalf of the Respondent, Douglas Williams, in the above-referenced case. Also enclosed is a corrected letter requesting permission to file the Brief on October 21, 1992, as opposed to September 21, 1992.

Sincerely,

Mark E. Olive

cc: Barry S. McNeill, Esq.

No. 92-111

OCT 21 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GARY T. DIXON, and LACY H. THORNBURG,

Petitioners,

v.

DOUGLAS WILLIAMS, JR.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May the bar of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny – precluding the announcement or application of new rules on collateral review subject to two narrow exceptions – be lifted in a *third* circumstance: when the State does not assert the *Teague* doctrine prior to appeal?

II. Whether the new rule of *McKoy v. North Carolina*, 494 U.S. 433 (1990), satisfies the second exception to the *Teague* doctrine and may therefore be applied retroactively on collateral review?

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No. 92-111

In The

Supreme Court of the United States

October Term, 1992

GARY T. DIXON, and LACY H. THORNBURG,

Petitioners,

v.

DOUGLAS WILLIAMS, JR.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICI*

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court recognized the limited role of federal habeas review by establishing a general rule barring the retroactive application of new rules on collateral review. This holding reflects the federalism and criminal justice interests in finality and comity and the validation of reasonable, good-faith state court determinations.

This case presents two important questions concerning the availability and application of the *Teague* doctrine. The *first* is whether the *Teague* doctrine may be waived when a State does not assert it prior to appeal. The *second* issue concerns the scope of the second exception to the *Teague* doctrine. *Amici* States have a substantial interest in protecting presumptively valid and final state court convictions and sentences from collateral attack on the basis of new rules which were unavailable at the conclusion of the direct review process.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

A North Carolina jury found Douglas Williams, Jr. guilty of murder in the first degree in the perpetration of first degree burglary, in the perpetration of a sex offense, and with malice and premeditation and deliberation. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, 341, *cert. denied*, 464 U.S. 865 (1983); *Williams v. Dixon*, 961 F.2d 448, 450 (4th Cir. 1992). The evidence showed that the victim, a 100-year old woman, was brutally tortured and battered. The jury recommended a sentence of death, which was imposed by the state trial court.

The direct review process was concluded in 1983, when this Court denied Williams' petition for writ of certiorari. *Williams v. North Carolina*, 464 U.S. 865 (1983). Following the denial of his request for state collateral relief, Williams filed a habeas petition in the U.S. District

Court, which was denied on September 13, 1988.[1] Williams appealed arguing, *inter alia*, that the district court erred in failing to hold the North Carolina jury instruction unconstitutional under *Mills v. Maryland*, 486 U.S. 367 (1988). *Mills* struck down a requirement that a jury must first *unanimously* find the existence of a mitigating factor before it could consider the specific mitigating evidence in issue.

On March 5, 1990, after the first oral argument in Williams' appeal, this Court decided *McKoy v. North Carolina*, 494 U.S. 433 (1990), which was predicated on *Mills* and held a North Carolina jury instruction unconstitutional for containing a unanimity requirement. Within one week of the *McKoy* decision, the State filed a letter of supplemental authorities asserting that the *Teague* doctrine precluded application of *McKoy*. The Fourth Circuit then ordered supplemental briefing on this issue.

In *Williams*, the U.S. Court of Appeals for the Fourth Circuit assumed that *McKoy/Mills* constituted a new rule within the meaning of the *Teague* doctrine and that the *McKoy/Mills* rule could still be retroactively applied because the second *Teague* exception was satisfied. *Williams*, 961 F.2d at 454-56. As an independent basis to vacate the sentence, the Fourth Circuit concluded that the State had waived the assertion of the *Teague* doctrine as an affirmative defense by failing to raise it prior to

---

[1] Five months *after* the district court denied the habeas petition, *Teague v. Lane*, 489 U.S. 288 (1989), a non-capital case, was decided on February 22, 1989. The *Teague* doctrine was extended to capital cases on June 26, 1989, in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

appeal. *Id.* at 457-58. The Warden and Attorney General of North Carolina have petitioned for writ of certiorari. This Court has now ordered the respondent to file a brief in opposition to the petition for writ of certiorari.

REASONS THE WRIT SHOULD ISSUE

I. The Existing Lower Court Conflict On Whether The *Teague* Doctrine May Be Waived Raises Fundamental Questions Concerning The Role And Scope Of The *Teague* Doctrine Requiring Clarification By This Court

a. Introduction

The *Teague* doctrine advances the federalism and criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system. Under the *Teague* doctrine, on collateral review, a petitioner may not obtain the retroactive application or announcement of "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States) unless the rule falls within one of two narrow exceptions.[2]

---

[2] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 376 (1992); *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193, 211 (1990); *Butler v. McKellar*, 494 U.S. 407, 412 (1990); *Penry*, 492 U.S. at 313, 329.

Permitting a waiver of the *Teague* doctrine in effect establishes a *third* occasion (or exception) when the general rule of non-retroactivity of new rules will not apply. Consequently, a waiver exception allows all of the principles advanced by the *Teague* doctrine to be disrupted, including the federalism and criminal justice interests in finality and comity,[3] and the validation of reasonable, good-faith determinations of federal rights by state courts.[4]

The federal circuits are split on whether and how a State may waive the *Teague* doctrine.[5] Until this Court resolves this conflict, several consequences will occur. Disparate development and application of constitutional principles will be countenanced, as some circuits will allow federal habeas review to be used as a vehicle for the announcement and application of new rules, while

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[3] *See, e.g., Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 377 ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry*, 492 U.S. at 314 (noting finality concerns under retroactivity doctrine); *Teague*, 489 U.S. at 308 (plurality opinion) (discussing the federalism and criminal justice interests of comity and finality).

[4] *See Butler*, 494 U.S. at 414; *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206; *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

[5] *See Williams*, 961 F.2d at 457-58 (noting split and citing numerous cases); *Clisby v. Jones*, 960 F.2d 925, 928 n.6 (11th Cir. 1992) (en banc) (same); *Boardman v. Estelle*, 957 F.2d 1523, 1534-35 (9th Cir.) (per curiam) (same), *cert. denied*, 61 U.S.L.W. 3264 (1992).

others will not. Where new rules are permitted on collateral review, the important finality and comity interests recognized by this Court will be undermined and reasonable, good-faith state court rulings will be disregarded. Until the waiver issue is resolved, the repercussions will extend beyond the particular case in which the new rule is sought. For example, the U.S. Court of Appeals for the Ninth Circuit has recently stated that where new rules are retroactively applied in one case, the court is *obligated* to apply the new rule in subsequent cases.[6] In resolving the present conflict among the circuits, this case presents an opportunity for full consideration of the jurisdictional and other questions raised by the waiver issue, which are briefly considered below.

b. This Case Presents An Opportunity To Clarify The Jurisdictional Nature Of The *Teague* Doctrine

The question on whether and how the *Teague* doctrine may be waived challenges the integrity of this important rule. The *Teague* doctrine is more than a principle simply respecting comity and finality interests. Other special

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[6] *See Jeffers v. Lewis*, No. 86-1840, 92 DAR 12484, n.4 (1992), *petition for cert. filed; Beam v. Paskett*, 966 F.2d 1563, 1570 n.5 (9th Cir. 1992), *petition for cert. filed*. The breadth of this avoidance of the *Teague* doctrine by these Ninth Circuit rulings cannot be overstated. New rules which are developed in proceedings arising in *other* States (or circuits for that matter) may be applied regardless of the State in which the habeas proceeding arises. This subjects every State to the risk of bearing the retroactive application of new rules arising in different States (or jurisdictions), even where the new rule is developed as a result of litigation tactics (e.g., waiver).

habeas corpus rules serve these interests as well.[7] More fundamentally, in light of those interests, the *Teague* doctrine implicates the *scope* and *purpose* of federal habeas review in our criminal justice system. For this reason, a strong argument can be made that the *Teague* doctrine is jurisdictional and therefore cannot be waived. As this Court has repeatedly stated, the heart of the *Teague* doctrine is premised upon the role and function of collateral review. *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle*, 494 U.S. at 488; *Butler*, 494 U.S. at 413. As Justice Harlan first noted, and this Court has reiterated on several occasions, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [petitioner] seeks, but instead the *purposes for which the writ of habeas corpus is made available.*"[8] Even the exceptions to the *Teague* doctrine have been established with a view toward the limited scope

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[7] *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640, 656 (1991) (applying independent and adequate state ground doctrine); *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 1469, 113 L.Ed.2d 517, 542, 543 (1991) (abuse of the writ doctrine); *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986) (procedural default doctrine); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) (general bar against successive petitions); *Rose v. Lundy*, 455 U.S. 509, 516, 518 (1982) (exhaustion doctrine under 28 U.S.C. §§ 2254(b), (c)); *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (presumption of correctness to state court findings of fact under 28 U.S.C. § 2254(d)).

[8] *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2830, 111 L.Ed.2d at 209; *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306 (plurality opinion)); *see also Saffle*, 494 U.S. at 486 (viewing the *Teague* doctrine as a "limitation on the proper exercise of habeas corpus jurisdiction").

of collateral review and the finality and comity concerns at stake. *See, e.g., Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211.

This jurisdiction theory finds direct support in the language of *Teague* and its progeny.[9] The *sua sponte* consideration of the *Teague* issue by this and other courts lends further support for the jurisdictional nature of this doctrine. *See* note 17, *infra*. Not surprisingly, this jurisdictional basis has led other lower federal courts to conclude that the *Teague* doctrine is non-waivable.[10] If this Court

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[9] *See, e.g., Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77 ("When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and our subsequent decisions interpreting it *require* a federal court to answer an *initial question*, and in some cases a second. . . . ") (emphasis added); *Saffle*, 494 U.S. at 486 (noting "on collateral review, we must *first* determine whether the relief sought would create a new rule") (emphasis added); *Penry*, 492 U.S. at 313 ("[W]e must determine, as a *threshold* matter, whether granting [the petitioner] the relief he seeks would create a 'new rule'.") (emphasis added); *id.* at 329 (noting on collateral review, retroactivity issue is addressed "as a *threshold* matter") (emphasis added); *Teague*, 489 U.S. at 300 (plurality opinion) ("Retroactivity is properly treated as a *threshold* question. . . . ") (emphasis added); *accord Wright v. West*, 112 S.Ct. 2482, 2499, 120 L.Ed.2d 225, 250 (1992) (Kennedy, J., concurring) (noting "there is no requirement that we engage in the *threshold Teague* inquiry in a case in which it is clear that the prisoner would not be entitled to the relief he seeks even if his case were pending on direct review") (emphasis added).

[10] *See Hill v. McMackin*, 893 F.2d 810, 813 (6th Cir. 1989) (court "compelled" to raise retroactivity issue); *Hopkinson v. Shillinger*, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) (noting the *Teague* doctrine presents a "threshold" inquiry implicating "the very scope of the writ of habeas corpus" and the "power [of

decides that *Teague* is jurisdictional, then it may conclude that – analogous to subject matter jurisdiction – the doctrine can never be waived and may in fact be asserted at any point during the proceeding.[11]

Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30, 38 (1990), does not establish that this Court has already rejected a jurisdictional basis for *Teague*. In *Collins*, this Court observed that, "Although the *Teague* rule is grounded in important considerations of federal state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue *sua sponte*." *Id.* (emphasis in original).

The language in *Collins* does not resolve the jurisdictional status of *Teague* but in fact obfuscates it, furnishing several additional reasons for this Court to reconcile the existing split among the lower federal courts. *First*, the *Collins* decision has clouded the waiver issue, as federal courts have wrestled with its language and rationale.[12]

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the court] to grant relief"), *cert. denied*, 110 S.Ct. 3256 (1990); *see also Moore v. Zant*, 885 F.2d 1497, 1519 n.5 (11th Cir. 1989) (en banc) (Kravitch, J., dissenting) (noting threshold nature of inquiry), *cert. denied*, 110 S.Ct. 3255, *stay granted*, 111 S.Ct. 11 (1990).

[11] *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (noting subject matter jurisdiction must respect, and is premised upon, statutory limits); *cf. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988) (noting "[t]he distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics").

[12] *See, e.g., Boardman*, 957 F.2d at 1536 n.1; *Thomas v. State of Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990); *see also* M. Arkin, *The*

Second, pre-*Collins* and post-*Collins* decisions of this Court have expressly noted that the *Teague* doctrine posits a threshold inquiry, lending support for a jurisdictional basis for *Teague*. *See* note 9, *supra*.

Third, *Collins* appears distinguishable as a case where: (1) the State was explicitly asked by the Court at oral argument for the first time whether it would rely on *Teague*, and (2) the State expressly articulated its *choice* not to rely on the doctrine. *Collins*, 497 U.S. at ___, 110 S.Ct. at 2718, 111 L.Ed.2d at 38; *see also Smith*, 904 F.2d at 981 n.12. As this Court noted in *Collins*, where comity and sovereignty issues are at stake, it is not unusual for the State to waive expressly such issues so that others may be considered. *See* 497 U.S. at ___, 110 S.Ct. at 2718, 111 L.Ed.2d at 38 (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 515 n.19 (1982) (Eleventh Amendment defense could be expressly waived by State to enable Court to resolve other issues)); *see also Wright*, 112 S.Ct. at

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Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane, 69 N.C.L. Rev. 371, 416 (1991) (noting *Collins* and other decisions have "left the lower courts in greater confusion than before and ha[ve] left litigants with little ability to predict the outcome of their own cases") (footnote omitted).

At least one court has construed *Collins* as enabling the court to reach the *Teague* question untimely raised by the State. *Smith v. Black*, 904 F.2d 950, 981 n.12 (5th Cir. 1990), *vacated and remanded on other grounds*, 112 S.Ct. 1463 (1992). Other courts, without reconciling the language in *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77, have overlooked the unique factual posture of *Collins* and have relied upon it for the broad proposition that *Teague* has no jurisdictional basis. *See Williams*, 961 F.2d at 457, 458; *see also Card v. Dugger*, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990); *Thomas*, 910 F.2d at 1416 (noting *Collins* "would seem to scotch earlier suggestions that the rule of *Teague* is jurisdictional").

2499, 120 L.Ed.2d at 250 (Kennedy, J., concurring) (noting the threshold inquiry of *Teague* is not necessary where it is clear the petitioner is not entitled to relief).

Fourth, the facts of this case are distinct from *Collins*. In the matter at bar, *Teague* was decided *after* the district court denied respondent's habeas corpus petition. *See* note 1, *supra*. The State therefore could not raise the *Teague* issue until the appeal. Even though *Teague* was decided after the district court's ruling, the assertion of *Teague* on appeal by the State is consistent with the principle, recognized by this Court, that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).[13]

Finally, even if *Collins* can be reconciled with the language in *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 376-77, *see* note 9, *supra*, *Collins* has not resolved all related issues on the waiver question, including those involving the facts of this case. For example, it is still an open issue: (1) whether silence may constitute a waiver; (2) whether in the face of a State's silence the court may still raise the *Teague* question *sua sponte*; (3) whether identified factors (e.g., finality and comity concerns) may be weighed in determining the appropriateness of waiver in a given case; or (4) whether a State may be deemed to have waived the issue when, as here, the *Teague* doctrine could not be asserted in the district court.

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[13] This principle has been applied by this Court in habeas corpus cases. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

c. Assuming *Arguendo* That *Teague* Is Not Jurisdictional, It Does Not Necessarily Follow That The *Teague* Doctrine Is Subject To Waiver As An Affirmative Defense

Assuming *arguendo* that *Teague* is not jurisdictional, there are other bases which would avoid the conclusion that the doctrine is waivable or is an affirmative defense. For example, the *Teague* doctrine might also be considered within the context of the burden on the habeas petitioner. The burden is on the habeas petitioner to establish a federal right violation.[14] This burden allocation also makes sense in light of the civil nature of habeas proceedings. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 & n.5 (1987); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 269 (1978) (citations omitted). Further, the *Teague* doctrine only applies to new rules which would benefit the petitioner. *See, e.g., Wright*, 112 S.Ct. at 2500, 120 L.Ed.2d at 250 (Souter, J., concurring).

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[14] *See, e.g., Fox v. Kelso*, 911 F.2d 563, 569-70 (11th Cir. 1990); *Scruggs v. Williams*, 903 F.2d 1430, F.2d (11th Cir. 1990); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (petitioner holds burden to establish ineffective assistance of counsel claim); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (on a collateral attack, "the burden of proof rests upon [a habeas petitioner] to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel"); *accord* 28 U.S.C. § 2254(d) (specifying level of burden on petitioner for factual determinations under more stringent "convincing evidence" standard); *Sumner*, 449 U.S. at 550 (discussing section 2254(d) standard); *cf. Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) ("In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence."); *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) (same).

Accordingly, this Court may conclude that it is appropriate for the petitioner to sustain the burden that the rule which he or she seeks to have announced or applied on collateral review is either not a new rule or satisfies one of the two exceptions to the *Teague* doctrine.

Independent of the burden on the habeas petitioner, it also makes sense for courts to deal with the applicability of the *Teague* doctrine at the outset of the proceeding. As a logical incident of the doctrine, this inquiry is justified as an initial matter concerning the use and availability of the writ of habeas corpus for relief. It may be for this reason that several courts have decided that *sua sponte* consideration of this issue is warranted. *See* note 17, *infra*.

Regardless of the resolution of these questions, it is difficult to conclude, as some lower courts have, that *Teague* may be deemed an affirmative defense in the traditional sense.[15] In the civil context, affirmative

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[15] Those cases deciding that the *Teague* doctrine may be waived as an affirmative defense have reached this determination in a conclusory manner without fully considering the role and purpose of this doctrine and the distinctions between the *Teague* doctrine and affirmative defenses. *See Boardman*, 957 F.2d at 1534 ("Some circuits (including this one) have allowed waiver, and others have not, but none has engaged in any significant analysis on the issue.") (parentheses in original); *see also Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir.) (en banc), *cert. denied*, 112 S.Ct. 3015 (1992); *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991) ("assuming, without deciding, that the State waived its defense of non-retroactivity"), *cert. denied*, 112 S.Ct. 1211 (1992); *Coe v. Thurman*, 922 F.2d 528, 533 n.1 (9th Cir. 1990); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1104 n.4 (6th Cir. 1990) (en banc) (concluding without discussion or citing any authority

defenses typically include duress, contributory negligence, statute of limitations, laches and release. *See* Fed. R. Civ. P. 8(c). In criminal proceedings, affirmative defenses usually include insanity, intoxication, self-defense and coercion. In contrast to these long-established affirmative defenses, which largely entail an allegation and proof of specific facts, the *Teague* doctrine posits a legal question, which not only implicates the scope of the writ of habeas corpus but also serves to validate the good-faith, reasonable legal determinations of state courts. Moreover, it is hard to classify the *Teague* doctrine as an affirmative defense when some courts, including this one, have allowed the issue to be considered *sua sponte*. *See* note 17, *infra*. Because the *Teague* doctrine does not contain any of the traditional attributes of an affirmative defense, it arguably should not be employed as an affirmative defense.

d. Assuming *Arguendo* That *Teague* May Be Waived, This Case Presents An Opportunity For This Court To Provide Guidance To The Lower Federal Courts On The Standards To Govern Waiver Cases

Even if this Court concludes that the *Teague* doctrine may be waived, the question becomes what standard should be employed to determine whether *Teague* should

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that the *Teague* doctrine may be waived), *cert. denied*, 111 S.Ct. 1608 (1991); *see also Moore*, 885 F.2d at 1524-25 (en banc) (Johnson, J., dissenting) (suggesting that the *Teague* doctrine may be waived but assuming *arguendo* issue was not waived).

be waived in a particular case. The possibility of waiver effectively creates a new exception to the *Teague* doctrine, permitting new rules to be established on collateral review. The Court can clarify when this third exception should operate.[16] For example, even the Ninth Circuit "discretionary waiver" approach acknowledges that comity and finality concerns are relevant factors to be assessed in determining whether *Teague* is waived in a particular case. *See Boardman*, 957 F.2d at 1537. Further, several courts, including this one, have raised the applicability of the *Teague* doctrine *sua sponte*.[17] A related question is whether, and under what circumstances, a court could *sua sponte* apply the *Teague* doctrine.

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[16] Other analogous waiver rules also contain exceptions. For example, the general appellate waiver rule (that issues not preserved at trial may not be considered on appeal) is not automatically applied in every case. *See, e.g., Boardman*, 957 F.2d at 1535; *Thomas*, 910 F.2d at 1415.

[17] *See, e.g., Saffle*, 494 U.S. at 496 n.1 (Brennan, J., dissenting) (noting *sua sponte* consideration of retroactivity issue); *Zant v. Moore*, 489 U.S. 836 (1989) (per curiam) (remanding after oral argument in light of *Teague*); *Wiley v. Puckett*, 969 F.2d 86, 96 n.13 (5th Cir. 1992) (considering retroactivity issue *sua sponte*); *Smith*, 904 F.2d at 981 & n.12 (court *sua sponte* requested supplemental briefing on *Teague* issue); *Hill*, 893 F.2d at 813 (noting issue may be raised *sua sponte*, but concluding no "new rule" was implicated); *Hopkinson*, 888 F.2d at 1288 (en banc) (court *sua sponte* raised *Teague* issue); *see also Hanrahan v. Greer*, 896 F.2d 241, 245 (7th Cir. 1990) (concluding state may waive issue but acknowledging that "a court may consider retroactivity questions that the parties did not present"), *later appeal*, 933 F.2d 1328 (7th Cir.), *cert. denied*, 112 S.Ct. 446 (1991).

II. The Conflict Whether The New Rule Of *McKoy v. North Carolina* May Satisfy The Second *Teague* Exception Provides An Opportunity For This Court To Furnish Guidance To The Lower Federal Courts On The Scope Of The Second *Teague* Exception

This Court has yet to decide a case where the second *Teague* exception applies, allowing the application and announcement of new rules on collateral review which involve " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311 (plurality opinion)); *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211 (noting two parts to second exception). To date, the primary example of a rule satisfying this exception is the right to representation by counsel in all criminal trials for serious offenses. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Saffle*, 494 U.S. at 495; *Teague*, 489 U.S. at 311-12 (plurality opinion).

This Court has acknowledged that "[t]he precise contours of this exception may be difficult to discern." *Saffle*, 494 U.S. at 495. Further, *Teague* noted the narrowness of the second exception, observing it is "unlikely that many [] components of basic due process [central to an accurate determination of innocence or guilt] have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion); *see also Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211 (referring to the narrowness of both exceptions); *Saffle*, 494 U.S. at 488 (same).

Unlike the appellate court below, other courts which have considered the *McKoy/Mills* holding have concluded

that it constitutes a new rule within the meaning of the *Teague* doctrine which may not be retroactively applied on collateral review.[18] Until clarity is provided on the scope of this exception, lower federal courts will continue to wrestle with the application of the second exception, allowing for the development of new rules on collateral review. Therefore, this case also presents an opportunity for the Court to provide guidance to lower federal courts on this important habeas issue.

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[18] *See Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992), *petition for cert. filed; see also Zettlemoyer v. Fulcomer*, 923 F.2d 284, 317 n.3 (3rd Cir.) (Sloviter, J., dissenting), *cert. denied*, 112 S.Ct. 280 (1991); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2840, *stay denied, cert. denied*, 112 S.Ct. 334 (1991).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for writ of certiorari.

Dated: October 21, 1992

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

Petitioners,

vs.

DOUGLAS WILLIAMS, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that certiorari is necessary in this case in order to provide proper guidance on the second exception to *Teague* v. *Lane*. Loose application of that exception threatens to undermine the rule.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate

in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Collateral attacks on final judgments based on subsequent changes in the law are fundamentally unfair to the people for the same reason that *ex post facto* laws are unfair to individuals. Allowing such attacks in the absence of a substantial risk of an actual miscarriage of justice is contrary to the interests CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1992

Respectfully submitted,

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Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Teague v. *Lane* was a major reform in the law of habeas corpus. It protected the people against unfair *ex post facto* abrogation of judgments which were legal when entered, subject to two narrow exceptions. To preserve the vitality of this reform, the exceptions must be kept narrow.

The second exception has caused confusion in the lower courts, and better guidance is needed. That guidance can be found in the strong connection between this exception and the "actual innocence" exception of *Murray* v. *Carrier*. Just as *Sawyer* v. *Whitley* eliminated from the *Murray* exception all cases where the defendant is guilty and eligible for the death penalty, so should all

rules dealing only with the sentencing of death-eligible defendants be excluded from the second *Teague* exception.

ARGUMENT

I. The second *Teague* exception is the subject of great confusion in the lower courts.

A. The Teague Decision.

Teague v. *Lane*, 489 U. S. 288 (1989) was a landmark decision, taking a giant step toward restoring balance and fairness to the criminal law. The effectiveness of that reform, however, depends on its proper implementation. Decisions such as the one in the present case threaten to nullify *Teague*.

The American legal tradition has long recognized that it is fundamentally unfair to declare an act illegal when it was understood to be legal at the time it was done. Criminal statutes having such an effect are expressly prohibited by the Constitution, on both the federal and state levels. U. S. Const. art. I, § 9, cl. 3, § 10, cl. 1. Retroactive expansion of criminal statutory prohibitions by judicial interpretation has long been recognized as so fundamentally unfair as to violate due process of law. *Bouie* v. *Columbia*, 378 U. S. 347, 353-354 (1964).

Teague extends this basic principle of fairness to the people. The question on habeas corpus is not whether the trial court erred but whether the state is violating the Constitution by keeping the prisoner in prison. 28 U. S. C. § 2254. If the state obeyed the law in effect when it entered the judgment, it is fundamentally unfair to the people to declare their judgment illegal merely because the rules have since changed. See *Engle* v. *Isaac*, 456 U. S. 107, 128, n. 33 (1982).

Teague recognizes, however, that there may be circumstances where a judgment legal when entered must be declared illegal because of an overriding imperative on

the other side. For this reason, there are two *narrow* exceptions to the rule. See *Saffle* v. *Parks*, 494 U. S. 484, 487-488 (1990). The question in this case is whether the second exception will continue to be narrow, or whether it will swallow the rule.

B. Exceptions and Innocence.

Throughout the recent development of habeas corpus law, this Court has sounded two themes. First, the Court has placed limits on the writ in order to partially return to the old rule that habeas will not be used as a substitute for or repetition of the appeal. See *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). To this end, limits have been placed on consideration of constitutional claims irrelevant to the accuracy of the result, *Stone* v. *Powell*, 428 U. S. 465 (1976); claims not timely raised in state court, *Engle* v. *Isaac*, *supra*; claims not raised in the first federal petition, *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); and attempts to relitigate claims in a successive petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) (plurality). At the same time, the Court has increasingly recognized the overriding imperative to correct actual miscarriages of justice, i.e. the convictions of people who are actually innocent. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

Teague itself explicitly recognizes these common threads. In defining the problem as one of the scope of the writ, *Teague* relies on *Engle*, *Murray*, *Kuhlmann*, and *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). *Teague*, 489 U. S., at 308. Similarly, in setting out the exceptions, *Teague* noted that "our cases have moved in the direction of reaffirming the relevance of the *likely accuracy of convictions* in determining the available scope of habeas review," citing *Kuhlmann* and *Murray*. *Id*., at 313 (emphasis added). *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 213, 110 S. Ct. 2822, 2832-2833 (1990) ("*Sawyer I*") similarly relied on procedural default/miscarriage of justice cases in its discussion of the second *Teague* exception.

From the very beginning, then, there has been a powerful connection between the *Teague* exceptions and the "actual innocence" exception of *Murray* and *Kuhlmann*. For the first *Teague* exception, the connection is simple and obvious. A person in jail for flag burning, 18 U. S. C. § 700, would be actually innocent. See *United States* v. *Eichman*, 496 U. S. 310 (1990). A person sentenced to death for rape would be "innocent of" (i.e., ineligible for) the death penalty. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This straightforward rule has caused little difficulty in the lower courts, with one appalling exception. See *Beam* v. *Paskett*, 966 F. 2d 1563 (CA9 1992), cert. pending, No. 92-464 (finding exception applicable to sane adult convicted of rape and murder of a 13-year-old girl).

The second exception, however, has created more problems. Like the first exception, it is rooted in the need to prevent an actual miscarriage of justice, defined as the conviction of an innocent person. *Teague*, 489 U. S., at 313. Unlike the first exception, however, "the precise contours of this exception" have proven "difficult to discern." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

Misunderstanding of the second *Teague* exception is rampant in the courts of appeals. *Graham* v. *Hoke*, 946 F. 2d 982 (CA2 1991), cert. denied, 116 L. Ed. 2d 793, 112 S. Ct. 890 (1992) is a prime example. *Graham* held, in effect, that *any* rule which supplanted a prior rule "altered our understanding of a 'bedrock procedural element.' " *Id.*, at 994. As long as it has some accuracy-enhancing effect, it would qualify for the second exception. The "narrow" exception would therefore encompass virtually all new rules thought to enhance accuracy, and *Teague* would be a dead letter.

Graham was nonetheless decided in the state's favor under harmless error analysis. 946 F. 2d, at 997. How a violation of a rule which is an "absolute prerequisite to

fundamental fairness," *Teague*, 489 U. S., at 314, can ever be harmless error is not explained.

Hopkinson v. *Shillinger*, 888 F. 2d 1286 (CA10 1988) is similar. The Court of Appeals in that case held that the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) qualified for the second exception and then proceeded to find the error did not affect the jury in that case. 888 F. 2d, at 1292, 1295. The former holding was abrogated by *Sawyer* v. *Smith*, *supra*.

The present case is both an example of the confusion and an opportunity to correct it. The Court of Appeals quotes *Sawyer* v. *Smith* out of context and announces a rule that *all* of this Court's Eighth Amendment capital sentencing rules meet the accuracy-enhancing requirement for the second *Teague* exception. *Williams* v. *Dixon*, 961 F. 2d 448, 454 (CA4 1992). The Court of Appeals then launches into a "death is different" dissertation which, if accepted, would effectively abrogate *Penry* v. *Lynaugh*, *supra*, and apply the second *Teague* exception to all penalty phase rules, something this Court explicitly refused to do in *Sawyer*, 111 L. Ed. 2d, at 212, 110 S. Ct., at 2832.

To clear up this confusion, *amicus* submits, the contours of the exception need to be more precisely defined. A statement that a rule "has none of the primacy and centrality of the rule adopted in *Gideon*," *Saffle*, *supra*, 494 U. S., at 495, provides insufficient guidance for lower courts. The proper guidance, *amicus* submits, can be found in recognition of the link between the *Teague* exceptions and the "actual innocence" rule of *Murray* v. *Carrier*.

II. Only rules essential to the prevention of miscarriages of justice qualify for the second exception.

Teague v. *Lane*, 489 U. S. 288 (1989) did not accept at face value Justice Harlan's assertion in *Desist* v. *United*

States, 394 U. S. 244, 262 (1969) (dissent) that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." Instead, *Teague* raised the threshold, "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313 (emphasis added). This limitation is fully consistent with *Teague*'s concern for preventing miscarriages of justice. If it is unlikely that trials conducted before the rule resulted in the conviction of innocent people, then the state's interest in finality outweighs the benefits, if any, of applying the rule to overturn final judgments.

The conclusion which immediately follows is obvious to any student of American criminal procedure jurisprudence. In the last decade of the twentieth century, there are few, *if any*, such rules remaining to be made. "Because we operate from the premise that such procedures would be so *central* to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Ibid.* (emphasis added). This is a very cautious understatement. The firestorm that swept through criminal procedure in the 1960's and 1970's left behind very little combustible material. We now have a system so heavily weighted in defendants' favor that there are no rules of *Gideon* magnitude remaining to be made.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) has been cited repeatedly as an example of the kind of rule which qualifies for the exception. *Teague*, *supra*, 489 U. S., at 311-312 (quoting *Mackey* v. *United States*, 401 U. S. 667, 694 (1971) (Harlan, J., concurring in the judgment)); *Saffle*, *supra*, 494 U. S., at 495. The reason is simple. Denial of counsel in the pre-*Gideon* era resulted in the conviction of many innocent people, including Gideon himself. Extension of the right to counsel to all felony defendants sharply reduced the number of fundamental

miscarriages of justice. The procedural requirements promulgated under the Eighth Amendment are entirely different.

In *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) ("*Sawyer II*"), this Court was confronted with the question of when a death sentence is a "miscarriage of justice" despite the facts that the defendant is actually guilty of murder, is actually eligible under state law, and is not within any of the categorical constitutional exclusions.[1] The majority said "never"; the concurrence said "almost never." The majority held that "the 'actual innocence' requirement must focus on those elements which render a defendant eligible for the death penalty . . . ." 120 L. Ed. 2d, at 585, 112 S. Ct., at 2523. The concurrence would also include those cases where *no* reasonable sentencer would have imposed the death penalty. *Id.*, at 120 L. Ed. 2d, at 301, 112 S. Ct., at 2536 (citing *Jackson* v. *Virginia*, 443 U. S. 307, 316-318 (1979)).

Of all the *procedural* rules promulgated under the Eighth Amendment after *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases,[2] which ones constitute rules the nonobservance of which is *highly likely* to result in a miscarriage of justice? The answer, *amicus* submits, is *none*. The categorical exclusion rules, which qualify for the first exception under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) take care of all of the ineligibility cases which the *Sawyer II* majority considered to be miscarriages of justice. Even if one accepts the view of the *Sawyer II* concurrence, that a miscarriage of justice would be possible despite

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1. See *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder accomplice with no intent to kill); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape, not murder); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (insane at time of execution); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (juvenile, no statutory minimum age).

2. We need not consider here categorical exclusions, which qualify under *Penry*, or the retroactivity of *Gregg* itself and its companion cases, which is a moot question.

eligibility, such a case would necessarily be extremely rare. Sandra Lockett would now be excluded by the rule of *Enmund*, *supra*. See *Lockett* v. *Ohio*, 438 U. S. 586, 589-591 (1978). Monty Eddings would now be excluded by the rule of *Thompson*, *supra*. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 105 (1982). None of this Court's other Eighth Amendment procedure cases presents facts on which *no* reasonable sentencer could find death to be the appropriate penalty, and indeed it is highly questionable whether the *Lockett* and *Eddings* cases are that clear.

At best, all of the post-*Gregg* procedural cases fit *Sawyer I*'s description of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). They are protections of some value and are thought to enhance accuracy of capital proceedings. However, they are layered on top of a foundation of due process protections which apply to capital and noncapital cases alike. They are also layered on top of the basic structure of *Gregg*, *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), which established the basic system of guided discretion we have today.

None of the post-*Gregg* procedural rules are "watershed rules of criminal procedure." See *Teague*, 489 U. S., at 311. None are "central to an accurate determination of innocence or guilt." See *id.*, at 313. None are essential to "the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction. . . ." *Id.*, at 315.

III. The *McKoy* rule is not essential to prevent miscarriages of justice.

The critical question is whether the rule of *McKoy* v. *North Carolina*, 494 U. S. 433 (1990) is an "absolute prerequisite to fundamental fairness." *Teague* v. *Lane*, 489 U. S. 288, 314 (1989). Is the *McKoy* rule "so central to an accurate determination of innocence or guilt" that

under the earlier North Carolina practice "the likelihood of an accurate conviction [was] seriously diminished"? *Id.*, at 313.

Translating "actual innocence" into the penalty phase as the *Sawyer II* majority did, the answer is simply and clearly no. Once a defendant has been found guilty of murder and eligible for a death sentence, the propriety of that sentence is a matter of opinion, and its imposition is never a miscarriage of justice.

Using the *Sawyer II* concurrence's approach requires a bit more analysis, but it yields the same result. The *McKoy* majority was concerned that "[t]he unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a ' "sentence less than death." ' " 494 U. S., at 439. How likely is this scenario in a case where "in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that *no reasonable sentencer* would have imposed the death penalty"? See *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 301, 112 S. Ct. 2514, 2536 (1992) (Stevens, J., concurring in the judgment) (emphasis added). How likely is such a verdict, so clearly contrary to the evidence, to survive review in the normal course of state procedure, including proportionality review by the state supreme court? See N. C. Gen. Stat. § 15A-2000(d)(2). That possibility, *amicus* submits, is far too tenuous to justify the fundamental unfairness to the people of an *ex post facto* application of *McKoy* to judgments already final.

A writ of certiorari is needed in this case to establish a categorical rule that *none* of the post-*Gregg* fine tuning of capital sentencing procedure qualifies for the second *Teague* exception. "Bait and switch" jurisprudence causes enough damage on direct review. See *McKoy*, *supra*, 494 U. S., at 470, n. 5 (Scalia, J., dissenting). Its application to judgments already final is indefensible.

CONCLUSION

A writ of certiorari should be granted.

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Respectfully submitted,

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